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Supreme Court, U.S.
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NO.

in the

Supreme Court

of the

United States

October Term, 1984

PATRICK C. WALDROP,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Albert J. Krieger
ALBERT J. KRIEGER, P.A.
1899 South Bayshore Drive
Miami, Florida 33133
(305) 854-0050
Attorney for Petitioner
WALDROP

Of Counsel:
Laurel White Marc-Charles
Suite 4
521 South Andrews Avenue
Ft. Lauderdale, Florida 33301
(305) 523-6225

QUESTIONS PRESENTED

1. Whether a court must instruct the trial jury in a RICO prosecution by defining the elements of such offense, and, in particular, by defining the enterprise, the pattern of racketeering activity, and their interrelationship, with full consideration to the statutory interpretation of such elements set forth in *United States v. Turkette*, 452 U.S. 576 (1981), and to the enterprise described in the indictment?

2. Whether the validity of Florida state applications to amend wiretap orders should be governed by Florida law; and, if no state precedent is on point, may a federal circuit court predict what Florida courts would decide if the issue were before it, rather than certifying the question for resolution by the highest court of the state?

3. Whether marijuana offenses are encompassed within the definition of racketeering activity contained in the RICO statute, when Congress specifically omitted reference to marijuana in the RICO bill as enacted?

LIST OF ALL PARTIES TO THE PROCEEDINGS

The following is a list of all parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit, whose judgment is sought to be reviewed herein by this Petitioner:

The United States of America
Patrick C. Waldrop
Antonio E. Bascaro
Russell Hobson, III
Manuel Eric Villanueva
Gustavo J. Fernandez
Manuel W. James

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Your petitioner, PATRICK C. WALDROP, prays that a writ of certiorari issue to the United States Court of Appeals for the Eleventh Circuit to review its decision entered on October 1, 1984, affirming his conviction.

OPINIONS BELOW

The Judgment and Commitment Order, dated April 26, 1982, is attached hereto as Appendix A. The Opinion of the United States Court of Appeals for the Eleventh Circuit affirming petitioner's conviction is reported at 742 F.2d 1335 (11th Cir. 1984), *sub nom. United States v. Bascaro.* A copy of this Opinion is also attached hereto as Appendix B.

JURISDICTION

The Opinion of the Court of Appeals for the Eleventh Circuit affirming petitioner's conviction was entered on October 1, 1984. A timely petition for rehearing was denied on December 6, 1984. (See Appendix C) Thereafter, a Motion To Stay Mandate Pending Application For Certiorari was granted, permitting such stay if the instant Petition For Certiorari is filed on or before January 20, 1985. (See Appendix D) The instant petition has been filed within this time period. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

United States Constitution:

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of

law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes:

18 U.S.C. §§ 1961(1)(A), (D). Definitions

As used in this chapter—

(1) "racketeering activity" means . . .

(A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year;

(D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

18 U.S.C. §1962(c), (d). Prohibited activities

. . . .

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in,

or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . .

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

STATEMENT OF THE CASE

Nature Of The Case And Its Disposition

Patrick Waldrop, petitioner, was indicted in the United States District Court for the Northern District of Florida, together with eleven others, in a 30-count indictment, charging various violations of federal statutes relating to the importation and possession of marijuana. Mr. Waldrop was charged in seven of thirty counts.

Numerous pre-trial motions were filed on Mr. Waldrop's behalf, including motions to suppress electronic surveillance.[1] These motions were denied.

On March 28, 1982, trial commenced against Mr. Waldrop and five of his co-defendants.[2] Of eighty witnesses called by the government, only five offered testimony directly relating to Mr. Waldrop. The other evidence offered against Mr. Waldrop were seized telephone conversations, obtained pursuant to Florida state ordered electronic surveillance.

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[1]These motions, initially filed and argued by counsel for co-defendant Manuel James, were adopted by Mr. Waldrop.

[2]Prior to trial, two defendants, James Sellers and Carlton Reeves, pleaded guilty. Four defendants, Jose Luis Acosta, Clifford J. Wentworth, John M. Araneo and Rene Benitez, had not been located by the time of trial.

After fifteen days of trial, on March 27, 1982, the jury returned verdicts of guilty as to all seven counts with which Mr. Waldrop was charged (Counts One, Two, Three, Four, Five, Nine and Ten). On April 26, 1982, the Honorable Lynn C. Higby sentenced Mr. Waldrop to a total of forty years imprisonment.

On April 30, 1982, a notice of appeal to the United States Court of Appeals for the Eleventh Circuit was filed. On October 1, 1984, the Eleventh Circuit affirmed Mr. Waldrop's conviction on all counts. A timely Petition For Rehearing was denied. Upon motion, the Eleventh Circuit stayed the mandate in order that review by this Court could be sought. This petition follows.

Statement Of Facts

The indictment charged twelve defendants with a conspiracy to violate 18 U.S.C. §1961, et seq., (the "RICO" statute) by allegedly agreeing to participate in a specific illegal enterprise organized and directed by three of them, Villanueva, Acosta, and Bascaro, for the purpose "of smuggling multi-ton quantities of marihuana . . . into the United States . . . and distribut[ing] . . . said marihuana." (Count One) The same twelve individuals were charged with a substantive RICO violation, 18 U.S.C. §1961, in Count Two, upon the same allegations.

This petitioner, Patrick Waldrop, was also charged in five of the remaining twenty-eight counts of the indictment: a conspiracy to import marijuana (Count Three); a conspiracy to possess with the intent to distribute marijuana (Count Five); a substantive charge of importation of marijuana on February 14, 1979, aboard a Constellation airplane (Count Four); and two substantive charges of possessing with the intent to distribute marijuana, the first on April 16, 1978, at a Tallahassee warehouse (Count Nine), and the second on February

14, 1979, aboard the Constellation airplane referred to in Count Four (Count Ten). The one substantive importation count (Count Four) and the two substantive possession counts (Counts Nine and Ten) were alleged as the predicate acts for each of the two RICO counts (Counts One and Two).

The indictment defined the charged enterprise as one established by three named individuals, Manuel Eric Villanueva, Jose Luis Acosta and Antonio E. Bascaro, for the purpose of importing, possessing, with the intent to distribute and distributing "multi-ton quantities of marihuana on a continuing basis." (Count One, ¶ 5) The "leader" of the enterprise was allegedly Manuel Eric Villanueva. (Count One, ¶ 17) Jose Luis Acosta and Antonio Bascaro were charged as "directors," whose functions were to promote the importation of marihuana into the United States and direct its subsequent distribution. (Count One, ¶ 18) Manuel W. James, a criminal defense attorney, allegedly would insure that lawyers were available for representation of members of the enterprise, in the event of arrest (Count One, ¶ 29), as well as allegedly organizing and managing a fleet of ships "owned by the enterprise" and used in its importation ventures. (Count One, ¶ 19) Gustavo J. Fernandez, allegedly working with co-defendant James in managing the fleet of ships (Count One, ¶ 29), was allegedly responsible for maintaining the ships' crews and dock side off-loaders. Clifford Wentworth, also an attorney, allegedly acted as the enterprise's corporate counsel and furthered its functions by preparing the appropriate legal documents relating to acquisitions and conveyances of real estate. (Count One, ¶ 21) Carlton Reeves allegedly selected off-load sites and recruited the "Rednecks" who acted as off-loaders and truck drivers. (Count One, ¶ 22) James L. Sellers, allegedly a member of the "Rednecks," served as a supervisor of the remaining off-loaders and truck drivers for the

enterprise. (Count One, ¶ 23) Rene Benitez' position was to allegedly "coordinate with South American suppliers" for the purchase by the enterprise of marijuana. (Count One, ¶ 26)

The petitioner's alleged connection with the charged enterprise was that "on several occasions [he] entered into contracts with the enterprise for the purchase of . . . marihuana." (Count One, ¶ 24) The other purported purchasers, Russell Hobson and Michael Araneo, were allegedly connected with the enterprise in a similar manner. (Count One, ¶¶ 24 and 25)

Cumulatively, the trial testimony of three cooperating accomplice witnesses—Clyde Walton ("Bill") Cobb, Thomas Alexander and Daniel Abbey—described an alleged drug organization established by Villanueva, Acosta and Bascaro. These three individuals would purchase and facilitate the importation of large quantities of marijuana into the United States by seagoing vessels. Fernandez, a boat captain coordinated the shipping. Cobb and his second-in-command, Alexander, located and purchased "holds" in Florida and Georgia, to which these vessels transported the contraband. Thereafter, Reeves and Sellers recruited a crew of off-loaders and truck drivers who took the marijuana from the vessel to certain farms or warehouses where it would remain, until purchasers bought and removed the marijuana. Abbey's role in this organization was to pick up money from the various ultimate purchasers, count it, determine Cobb's profit and expenses, and deliver the remainder to Acosta in payment for the initial cost of the imported contraband. Petitioner Waldrop and co-defendant Hobson were identified as two of the many buyers with whom the enterprise dealt from time to time.

The three substantive charges, the only predicate acts upon which the RICO counts against Mr. Waldrop

rested, related to two specific events. The first predicate act, as well as the first event, is set forth in Count Nine, which alleged that Villanueva, Acosta, Bascaro, James, Reeves, Sellers, Araneo and Mr. Waldrop possessed 80,000 lbs. of marijuana stored in a Tallahassee, Florida, warehouse on or about April 26, 1978. At trial, Mr. Waldrop was identified as a potential "buyer" for some marijuana by Cobb; and Abbey testified that it was his impression that Mr. Waldrop had "seen some of the" marijuana stored at the Tallahassee warehouse and "even stacked some out," but that he had been unable to take possession of it. Ultimately, the Tallahassee warehouse was raided by agents of the Florida Department of Law Enforcement, and the marijuana found inside was seized.

The second event, comprising the other two predicate acts, is set forth as substantive violations of law in Counts Four and Ten. It is this second event—related to an attempted importation of marijuana aboard a Constellation aircraft—which is most critical to the issues presented in this petition.

Alexander, one of the accomplice witnesses cooperating with the government, testified that in early 1979, Cobb,

> . . . got involved with a second group of people. The first group, Mr. Cobb, Mr. Acosta, those people used nothing but shrimp boats and they brought [marijuana] by water. We got—we made connections with a man by the name of Mr. Simeone who did smuggling by air.

Cobb testified in a similar fashion. An enterprise separate and distinct from the combination described in the indictment had been formed to import marijuana aboard a Constellation aircraft. No "Cubans" were involved in this attempted importation, and as a fact,

the importation was in direct competition with the financial interests of the enterprise charged in the indictment. Cobb further elaborated:

> Q. No cubans were involved in that situation were there?
>
> A. No. * * *
>
> Q. Okay, but since it was not involved with Acosta and his group, you wouldn't have been getting money from any of those people for that deal, would you?
>
> A. If you're talking about the Constellation, no.

Cobb characterized the venture as one in which, "Pat Waldrop, Russ Hobson, and I was kind of on my own . . ." The competitive nature of this importation was further demonstrated by the evidence that during the same period Cobb and the "enterprise"—Bascaro, Acosta, Villanueva (the "Cubans")—as well as Fernandez, were engaged in plans for a separate and unrelated marijuana importation by shrimp boats, into the Savannah, Georgia, region.

In order to assist the jury, Mr. Waldrop proposed several instructions to be submitted to them. Each was designed to compel the jury to deliberate in accordance with the two-step process required when a jury considers a RICO charge. The first focused upon the enterprise, looking to the indictment for its definition. (See Appendix E, Waldrop's Requested Instruction #1) The next step and its related instructions directed the jury to determine whether, if an enterprise was found, the predicate acts submitted to it were in furtherance of that enterprise. (See Appendix E, Waldrop's Requested Instruction #3 and #4) Mr. Waldrop's proposed theory of defense instructions also incorporated these ultimate issues.

(See Appendix E, Waldrop's Requested Instructions #9 and #10) All proposed instructions were rejected.

Over objection, the trial court instead instructed that the enterprise that the jury must find, in order to convict, was not the one defined in the indictment, but rather "a group of individuals associated in fact." (See Appendix F, p. F-2) The group of individuals to which the court referred was merely an amorphous number of persons importing and distributing marijuana. The remaining instructions similarly failed to assure that the enterprise to which the predicate acts must relate must be the one specifically defined in the indictment and subject to proof at trial. (See Appendix F)

Upon such instructions, the trial jury returned verdicts of guilty against Mr. Waldrop on all counts.

On appeal, the Eleventh Circuit declared the trial court's instructions adequate, and found no error in the refusal to give Mr. Waldrop's proposed instructions.

Mr. Waldrop was not tried upon the charges returned by the indicting grand jury. Rather, he was convicted of serious offenses based upon charges newly drafted by the trial court in its instructions to the trial jury. Clearly, Mr. Waldrop's rights under the Fifth and Sixth Amendments to the United States Constitution were violated, and therefore he seeks review by this Court, and requests that it issue its writ of certiorari for the following reasons.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S AFFIRMANCE OF THE TRIAL COURT'S ERRONEOUS INSTRUCTIONS, REGARDING THE CHARGED ENTERPRISE AND THE ELEMENTS NECESSARY TO SUSTAIN A CONVICTION OF THE RICO COUNTS, VIOLATES THIS COURT'S RULING IN *UNITED STATES V. TURKETTE*

This Court, in holding that an "enterprise" may embrace both a legal or illegal entity, has emphasized the crucial nature of proving the existence of an "enterprise" distinct from the mere accumulation of charged predicate acts, *United States v. Turkette*, 452 U.S. 576, 583 (1981):

> That a wholly criminal enterprise comes within the ambit of the statute does not mean that a 'pattern of racketeering activity' is an 'enterprise.' In order to secure a conviction under RICO, the government must prove both the existence of an 'enterprise' and the connected 'pattern of racketeering activity.' The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. 18 U.S.C. Section 1961(1). *The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.* The latter is proved by evidence of the requisite number of acts of racketeering

committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. *The 'enterprise' is not the 'pattern of racketeering activity;' it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the government.* (Emphasis added.)

The petitioner, Patrick Waldrop, urged four interrelated errors, at both the trial court and appellate level. Relying upon how the "enterprise" is distinct from the "pattern of racketeering activity" as set forth in *Turkette, supra*, Mr. Waldrop has contended that the trial court erred in these specific regards: 1) that by failing to identify the enterprise in the terms by which it was defined in the indictment, the trial court failed to instruct the jury how to make a proper factual determination on an essential element of the RICO charges against the petitioner, to wit: the enterprise; 2) that this failure further misinstructed the jury regarding the identity of the enterprise to which the predicate acts must relate, and indeed, improperly merged the elements of the enterprise and the pattern of racketeering into one; 3) the misdefined enterprise prevented the jury's consideration of Mr. Waldrop's factually-supported defense that two of the three predicate acts, through which he was charged with having violated the RICO statute, were not related to the affairs of the charged enterprise; and 4) the misdefined enterprise permitted the jury to return verdicts of guilty to the RICO counts upon legally insufficient evidence. We urge each of these fatal errors—all the product of the trial court's and Eleventh Circuit's failure to adhere to the dictates

of *Turkette* — as reasons why this Court ought to grant the writ in this case. To illustrate.

There is no dispute relating to the structure and hierarchy of the enterprise involved. In its opinion, the Eleventh Circuit confirmed the following facts relating to the enterprise charged and subject to proof at trial:

> Evidence adduced at trial indicates that appellants *Bascaro and Villanueva, together with one Jose Acosta,* who was separately tried and convicted, *were the organizers and principal decision makers of the enterprise.*

United States v. Bascao, 742 F 2d 1335, 1342 (11th Cir. 1984).

> Cobb testified that from the time of his first involvement in the conspiracy, *Acosta, Bascaro, and Villanueva were the ones principally responsible for bringing marijuana into the United States.* Cobb testified that Villanueva was involved in overseeing the purchase of suitable vessels, was present at storage sites when marijuana arrived, and participated in planning meetings. Cobb further testified that Villanueva furnished the money to purchase the properties where marijuana was stashed . . .; Villanueva together with Acosta were responsible for approving the sites where marijuana was to be offloaded . . .; and the enterprise deferred to Villanueva's judgment as to when the offloading was to occur.
>
> Abbey testified that *the standard operating procedure of the enterprise was for him to collect the proceeds from various drug sales and turn them over to Villanueva and Acosta.* . . . (Emphasis added.)

Id. at 1357.

The Eleventh Circuit similarly confirmed that the evidence showed that the Constellation venture—which embraced two of the three predicate acts through which the petitioner was alleged to have engaged in the enterprise's affairs—was orchestrated by Cobb, not the three named leaders of the enterprise:

> . . . Cobb, together with Waldrop and Hobson, made arrangements for the delivery of a planeload of marijuana.
>
> * * *
>
> The venture was headed by Cobb. . . .
>
> * * *
>
> In this case, Cobb indicated that he, Waldrop and Hobson were primarily responsible for the Constellation venture.

Id. at 1358, 1363, 1364.

The government conceded in its Brief filed below, that the Constellation venture was not an activity of the enterprise controlled by Villanueva, Acosta and Bascaro. *See* "Brief for the United States," p. 29:

> Cobb decided to engage in a venture independently of his Latin Associations.

See also, id. at 31:

> At the same time that Cobb planned the airplane smuggling venture *without* his Latin associates, he met with Acosta, Bascaro and Villanueva to discuss [a different venture]. (Emphasis added)

See also, id. at 144:

> The only difference between the Constellation scheme and the others were the use of an

airplane instead of a vessel and the exclusion of *Acosta, Bascaro, Fernandez and Villanueva from the planning and sharing of profits.* (Emphasis added.)

Removing the core of an enterprise leaves it without its identity. What remains may be an enterprise, but it is a different one.

The Eleventh Circuit[3] mistook the pattern of racketeering activity for the enterprise. This error permeated the instructions to the jury as given by the trial court. Therefore, there was no presentation to the

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[3]The Eleventh Circuit inexplicably suggests that the Constellation venture followed quickly on the heels of an initial unsuccessful attempt to import marijuana into the Fort Lauderdale airport. *Bascaro*, 742 F.2d at 1358. The government neither urged at trial nor upon appeal that either Waldrop or Hobson were in any way related to this attempted importation in January. The reason for this is simple: the facts adduced at trial demonstrated that this particular misadventure was independently undertaken solely by Cobb, Victor Simeone and Clifford Wentworth.

Further, the Eleventh Circuit attempted to link the Constellation load to the enterprise by the fact that defendant James, an attorney, represented the pilot after the plane was seized and he was arrested. *Bascaro*, 742 F.2d at 1363. James was acquitted at trial, not only of any involvement in the Constellation venture, but also of both RICO charges. *Id.* at 1342. Finally, it urged that Acosta "assumed responsibility for the venture by stepping in to rescue Cobb after the venture had failed." This assistance was only after the seizure had occurred, and related solely to attempting to calm an irate Colombian supplier, who had not been paid. No evidence was adduced at the trial of this case that Acosta knew of the Constellation venture prior to the seizure, or had any interest in it, financial or otherwise. The Eleventh Circuit's misconstruction of these facts is more fully set forth in the petition for a writ of certiorari filed by petitioner's co-defendant, Russell Hobson, III; such petition being filed contemporaneously herewith.

trial jury of the separate issues of determining the existence of an enterprise, an "ongoing organization" as defined in the indictment, and that that enterprise exists "separate and apart from the pattern of activity" in which it is alleged to have engaged. *United States v. Turkette*, 452 U.S. at 583.

Under the charge given to the jury in this case, *any* criminal activity related to the importation and distribution of marijuana by any of the persons charged in the indictment would have sufficed to link that defendant inescapably to a racketeering enterprise, regardless of the makeup of the enterprise, its objectives, and also regardless of whether the specific criminal activity of the defendant was in furtherance of, or in competition with, and, therefore, directly contrary to the interests of the charged enterprise.

The Constellation venture was Cobb's own, and the exclusion of the "Cubans" (Acosta, Villanueva, and Bascaro) meant that the enterprise's most basic structure—through which decisions, purchases, and profits were made and distributed—had been deliberately not used. Thus, Cobb's singular effort in importing by plane, without the assistance of the organizers or instrumentalities of the enterprise, is analogous to a hardware salesman for Sears making an off-hours sale of his own tools to a customer whose money he then retained for his own personal use. Indeed, in both circumstances, the transaction is in direct competition with the enterprise, thereby foreclosing any beneficial effect or furtherance of its interests.

Given these factual circumstances, the Eleventh Circuit's failure to redress the trial court's erroneous instructions regarding the enterprise not only sanctioned the trial court's refusal to instruct the jury on an essential element of the charge, but spawned a myriad of interrelated errors.

By refusing to define the enterprise by its structure and organizational hierarchy, but, rather, by defining it by its generalized purpose, the trial court expanded the enterprise's scope until it was no more than a recital of the pattern of predicate acts through which it was alleged to have engaged. This instruction thereby altered and amended the crime upon which the petitioner was charged and tried. Such unsupported alteration, violates the petitioner's constitutional guarantees. *Dunn v. United States*, 442 U.S. 100, 106-07 (1979):

> Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused.

Accord, Gregory v. Chicago, 394 U.S. 111, 112 (1969); *Cole v. Arkansas*, 333 U.S. 197, 202-220 (1948); *Thornhill v. Alabama*, 310 U.S. 85, 96 (1940); *DeJonge v. Oregon*, 299 U.S. 353, 362 (1937).

Indeed, the trial court in its charge explained that, to convict on the RICO counts, the jury need only find that the underlying evidence demonstrated that Mr. Waldrop engaged in conduct "for the purpose of importing . . . possessing . . . [and/or] distributing . . . multi-ton quantities of marijuana" in combination with a "group of individuals associated in fact," thereby eliminating the charged enterprise element altogether. (See Appendix F) In this case, any two acts, if proved, satisfied such a finding. As the Eighth Circuit has held, unless the jury is instructed to find the existence of an enterprise to which the predicate acts relate before they could vote to convict, they may well return multiple convictions upon charges which cannot support such a result:

> Elimination of the 'enterprise' element of the offenses would pose difficult problems relating to the Fifth Amendment's guarantee against double jeopardy. The 'enterprise' element

> provides an essential ingredient in the constitutionality of the composition and structure of a section 1962(c) offense. Because a defendant may be separately prosecuted for the two predicate crimes [citing cases] only by requiring proof of an 'enterprise' that engages in or has activities affecting interstate or foreign commerce does section 1962(c) require proof of a fact other than facts to prove the predicate crimes [of conspiracy].

United States v. Anderson, 626 F.2d 1358, 1367 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

The failure of the trial court to distinguish between the enterprise and the predicate acts deprived the petitioner of properly addressing his defense to the charges in the indictment—either through proper instructions addressed to the RICO counts, or the theory of defense instructions he proposed—and permitted the jury to convict him on an erroneous instruction of law.

For these reasons, we pray that this Court grant certiorari so it may reaffirm the rule announced in *United States v. Turkette*, 452 U.S. 576 (1981).

II.

THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO RESOLVE A CONFLICT IN THE CIRCUITS RELATING TO THE METHODS BY WHICH THE ESSENTIAL ELEMENTS OF AN ENTERPRISE AND RELATED PREDICATE ACTS IN A RICO PROSECUTION ARE TO BE PROVED UNDER THE PRINCIPLES ANNOUNCED IN *UNITED STATES V. TURKETTE*

The federal circuits are presently divided over the criteria by which they should determine whether the

identity of an enterprise, and the nexus between it and the alleged predicate acts have been properly proved beyond a reasonable doubt. By granting certiorari in this case, this Court will be able to resolve this conflict, and assure the evenhanded treatment of these issues by all federal circuits.

Specifically, the Court of Appeals for the Eighth Circuit in *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 456 (1983), described three characteristics an alleged "enterprise" must exhibit in order to meet the requirements set forth by this Court in *United States v. Turkette*, 452 U.S. 576 (1981): (1) a common or shared purpose; (2) some continuity of structure and personnel; and (3) an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering. *Accord, United States v. Lemm*, 680 F.2d 1193, 1198 (8th Cir. 1982). These characteristics "are mandated," the Eighth Circuit held, to avoid the very results which have occurred here, *United States v. Bledsoe*, 674 F.2d at 663-64:

> Each element of the crime, that is, the predicate acts, the pattern of such acts, and the enterprise requirement, was designed to limit the applicability of the statute and separate individuals engaged in organized crime from ordinary criminals. The enterprise requirement must be interpreted in this light.
>
> * * *
>
> [U]nder RICO, an enterprise cannot simply be the undertaking of the acts of racketeering, neither can it be the minimal association which surrounds these acts. Any two criminal acts will necessarily be surrounded by some degree of organization and no two individuals will ever jointly perpetrate a crime without some

> degree of association apart from the commission of the crime itself. Thus unless the inclusion of the enterprise element requires proof of some structure separate from the racketeering activity and distinct from the organization which is a necessary incident to the racketeering, the Act simply punishes the commission of two of the specified crimes within a 10-year period. Congress clearly did not intend such an application of the Act.
>
> A comparison of the severe penalties authorized by RICO with those for conspiracy indicates that the Act must have been directed at participation in enterprises consisting of more than simple conspiracies to perpetrate the predicate acts of racketeering.

"To guarantee that RICO will be utilized against its intended target, the 'enterprise' alleged must involve more than an association of criminals for the commission of sporadic crime." *United States v. Lemm*, 680 F.2d at 1198.

The Third Circuit also requires similar criteria, based upon its reading of *Turkette*. *United States v. Riccobene*, 709 F.2d 214 (3d Cir.), *cert. denied sub nom. Ciancaglini v. United States*, ____ U.S. ____, 104 S.Ct. 157, 78 L.Ed.2d 145 (1983). *See Seville Indus. Machinery v. Southmost Machinery*, 742 F.2d 786, 789 (3d Cir. 1984) (involving a civil RICO suit):

> In *Riccobene* this court stated that in order to establish the existence of an enterprise, the government must demonstrate 1) that the enterprise is an ongoing organization with some sort of framework or superstructure for making or carrying out decisions; 2) that the members of the enterprise function as a continuing unit

with established duties; and finally 3) that the enterprise must be separate and apart from the pattern of activity in which it engages.

Had either the Third Circuit or the Eighth Circuit test been utilized by the Eleventh Circuit in this case, the lack of connection between the Constellation venture and the charged enterprise would have been evident and an inescapable conclusion.

While the "common or shared purpose" test may, in many cases, not be enterprise specific, the remaining two characteristics of the *Bledsoe* analysis will furnish the appropriate differentiation. Therefore, the continuity of structure and personnel may be critical to the identification of an enterprise. *See United States v. Bledsoe*, 674 F.2d at 665:

> This does not mean the scope of the enterprise cannot change as it engaged in diverse forms of activity nor does it mean that the participants in the enterprise cannot vary with different individuals managing its affairs at different places. What is essential, however, is that there is some continuity of both structure and personality. For example, the operatives in a prostitution ring may change through time, but the various roles which the old and new individuals perform remain the same.

As the evidence in the instant case showed, the continuity of the enterprise defined in the indictment, through the control exercised by Villanueva, Acosta and Bascaro, continued unchanged before, during and after the Constellation venture. Indeed, while Cobb was making secret arrangements for the importation of marijuana aboard the Constellation, he was also fulfilling his role in the enterprise by gathering the personnel necessary to complete an importation furthering the interests of

the enterprise, dubbed by the government as "Savannah Two." This undeniably continuing structure was—by the government witnesses' admissions—intentionally bypassed in the Constellation venture, so that Cobb could reap the profits for himself.

Similarly, application of the Eighth Circuit's third characteristic to the facts in this case, would also have led the Eleventh Circuit to a result in accord with the pronouncements of *Turkette*:

> Finally, an enterprise must have an 'ascertainable structure' distinct from that inherent in the conduct of a pattern of racketeering activity. . . . This distinct structure might be demonstrated by proof that a group engaged in a diverse pattern of crimes or that it has an organizational pattern or system of authority beyond what was necessary to perpetrate the predicate crimes. The command system of a Mafia family is an example of this type of structure as is the hierarchy, planning, and division of profits within a prostitution ring.

United States v. Bledsoe, 674 F.2d at 665.

It is obvious that enterprises, such as the one defined in the indictment, are constructed for a financial purpose, though that purpose be criminal. The glue which holds the enterprise together is the mutual effort of those in the enterprise to generate funds which profit participants and members of that enterprise. Therefore, the distinction is categorical and unequivocal when a member of a defined enterprise enters into a transaction or series of transactions competitive with the enterprise. The efforts of Cobb, in the Constellation venture, could well have led to the destruction of the enterprise which counted as its founders and its financiers those who have been referred to throughout the

prosecution as the "Cubans." It is rather bizarre, then, to contend that such contravening efforts are in furtherance of that enterprise. It seems that objective definition requires the recognition of such competition as being an enterprise different from, and separate from, that charged in the indictment. When Cobb sought to arrange an importation of marijuana upon the Constellation aircraft, he engaged in an activity in which the enterprise had no interest whatsoever.

Though the Eighth Circuit has relied upon *United States v. Turkette, supra*, in fashioning its criteria, the Eleventh Circuit has expressly held that, in determining the sufficiency of an enterprise, its own pre-*Turkette* precedent, *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978), will be followed instead. *See United States v. Cagnina*, 697 F.2d 915, 921 (11th Cir. 1983):

> We recognize that the Eighth Circuit has held that a RICO enterprise must possess an 'ascertainable structure' distinct from the association necessary to conduct a pattern of racketeering activity. *United States v. Lemm*, 680 F.2d 1193, 1198 (8th Cir. 1982); *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982); *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). In *Anderson*, the court expressly acknowledged that its position was contrary to *Elliott*, 626 F.2d at 1372.

Since "*Elliott* has been cited with approval in this Circuit after *Turkette*," and because this Court "noted that the organization may be formal or informal," the Eleventh Circuit has refused to adopt the functional rule set forth by the Eighth Circuit. *United States v. Cagnina*, 697 F.2d at 921. We must assume, based upon

its reliance upon precedent prior to its split from the Fifth Circuit, that the Fifth Circuit will as well follow its lead. *Cf., United States v. Cauble*, 706 F.2d 1322, 1340 n.60 (5th Cir. 1983) ("We [do not] need to decide whether, as the court held in *United States v. Bledsoe*, 674 F.2d 647, 664-65 (8th Cir.), *cert. denied*, ____ U.S. ____, 103 S.Ct. 456, 74 L.Ed. 608 (1982), it is essential that an enterprise have an ascertainable structure, operate as a continuing unit and have a goal common to its members. *See Cagnina*, 697 F.2d at 921 (suggesting that this test conflicts with Fifth Circuit test). Here the enterprise had all of these characteristics.").

The practical effect of the rejection of Eighth Circuit construction is a rejection of the *Turkette* standards, as this case demonstrates. The Second Circuit, which also has expressly refused to adopt the Eighth Circuit's criteria in *United States v. Mazzei*, 700 F.2d 85, 89-90 (2d Cir. 1983), has recently declared that *Mazzei* now has interpreted this Court's holding in *Turkette, supra*, in such a limited manner that it has readopted its pre-Turkette precedent in determining the definition of a RICO enterprise. *United States v. Bagaric*, 706 F.2d 42, 55 (2d Cir. 1983):

> [T]his court has recognized that the nature of misconduct often provides the best clue toward defining the enterprise. *We have upheld application of RICO to situations where the enterprise was, in effect, no more than the sum of the predicate racketeering acts. United States v. Mazzei*, 700 F.2d 85 at 88-89 (2d Cir. 1983); *United States v. Errico*, 635 F.2d 152, 156 (2d Cir. 1980), *cert. denied*, 453 U.S. 922, 101 S.Ct. 3142, 69 L.Ed.2d 994 (1981); *United States v. Altese*, 542 F.2d 104, 106 (2d Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1039, 97 S.Ct. 736, 50 L.Ed.2d 750 (1977). These

> decisions reflect the common sense recognition that a group of individuals may join together, and therefore be 'associated in fact,' Section 1961(4) although not a legally cognizable entity in one of the traditional forms, id., solely for the purpose of conducting their activities. That is, *it is logical to characterize any associative group in terms of what it does, rather than by abstract analysis of its structure.* (Emphasis added.)

Such widening deviation from the holding in *Turkette* has in fact caused one Circuit Judge to erroneously assume that "the 'enterprise' element, in light of the Supreme Court's holding in *Turkette*, has become a fiction. It has become synonymous with another element of the offense, namely, the 'pattern of racketeering activity," i.e., the two underlying . . . offenses." *United States v. Licavoli*, 725 F.2d 1040, 1053 (6th Cir. 1984) (Circuit Judge Merritt, concurring).

This gradual backslide to assessing the enterprise element as if it were merely a synonym for the pattern of racketeering activity, by defining it by its purpose, violates the express terms of this Court's holding in *Turkette*. No matter how one seeks to devise a formula by which an enterprise may be found or described, the error in this case remains the same. This case is distinguished by an indictment that has carefully defined the enterprise. If the indictment had utilized language that would support a conclusion that an associative group, loosely limited, might be the enterprise which is the core of that particular RICO offense, different questions might be presented to this Court. The issue arises here because the precise language of the indictment was functionally stricken by the trial court, and in its place the associative group was substituted as the enterprise. No one of the cases that have utilized a

loose or amorphous framework for the enterprise structure has dealt with the issue of two separate and competing "enterprises," being the same for the purposes of a single RICO prosecution.

Were this Court to grant certiorari in the instant case, we would urge that the fulfillment of criteria, similar to that utilized by the Eighth and Third Circuits in determining the proper shape of a RICO enterprise, is required and in accord with this Court's decision in *United States v. Turkette*. By granting certiorari in this case, therefore, this Court will be able to resolve this conflict among the Circuits, which concerns a critical analysis affecting virtually all RICO prosecutions.

III.

THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE VALIDITY OF THE STATE-AUTHORIZED WIRETAP EVIDENCE UTILIZED IN THIS CASE AS THE ELEVENTH CIRCUIT'S OPINION ON THIS ISSUE DIRECTLY CONFLICTS WITH THE OPINION OF ANOTHER FEDERAL COURT OF APPEALS AND ITS PROCEDURE SO FAR DEPARTS FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS

Several applications and resulting state orders were filed and issued to obtain the wiretapped conversations utilized as evidence at trial against this petitioner. The most crucial of these conversations against petitioner were those intercepted by the authority of orders resting upon the January 15, 1979, and January 29, 1979, applications by an agent of the Florida Department of Law Enforcement. Each sought amended orders because of a change in telephone numbers. In

both instances, the agent merely relied on the previously entered order the application sought to amend, instead of presenting a showing of probable cause.

On appeal, three decisions of intermediate Florida courts of appeal were urged for the proposition that, under Florida law, a new showing of probable cause was required in applications for amendments, such as these. *See Sarno v. State*, 424 So.2d 829 (Fla. 3d DCA 1982); *Bagley v. State*, 397 So.2d 1036 (Fla. 5th DCA 1981); *Wilson v. State*, 377 So.2d 237 (Fla. 2d DCA 1979).

Although the Eleventh Circuit acknowledged that "the requirements of state and federal law govern a federal district court's determination of the validity of wiretap warrants obtained by state law enforcement officers in state courts," *United States v. Bascaro*, 742 F.2d at 1347, it then proceeded to distinguish the Florida cases upon facts present in them which were not present in the instant case, and predicted how Florida courts would rule, if the instant case were before it. Upon rehearing, the Eleventh Circuit was asked to certify the question to the Florida Supreme Court, consistent with routine federal practice. This request was denied. Given the Eleventh Circuit's holding that there was no Florida precedent on point, its failure to certify the question so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's supervisory power.

Furthermore, the First Circuit has presently held that the statutes under which wiretap applications and orders are initially authorized must govern not only their validity but also the validity of any applications or orders for amendments. *United States v. Smith*, 726 F.2d 852 (1st Cir. 1984) (en banc). This issue has never been addressed by this Court.

The Eleventh Circuit's approval of these applications for amendment, by its cursory treatment of Florida law, and its disregard for the fact that Florida law must govern the validity of the applications, directly conflicts with the First Circuit's resolution of a similar issue in *United States v. Smith, supra.* This Court should grant certiorari to resolve this conflict between the circuits upon a crucial issue of wiretap law.

IV.

THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW NOT YET RESOLVED BY IT: WHETHER THE RICO STATUTE PERMITS MARIJUANA OFFENSES TO BE CHARGED AS PREDICATE ACTS THEREUNDER

The three predicate acts with which petitioner was alleged to have engaged in the activities of the RICO enterprise, and upon which his subsequent convictions on Counts One and Two rest, involved purchases of marijuana. RICO requires that the predicate acts, which constitute the charged racketeering activity be one of several enumerated state and federal felonies, including those involving "narcotic or other dangerous drugs." 18 U.S.C. §1961(1)(A), (D). This Court ought to grant certiorari in order that it may decide an important question of federal law not yet resolved by it: whether Congress intended to treat marijuana transactions as racketeering acts under 18 U.S.C. §1961(1)(A), (D). Alternatively, we urge this Court to consolidiate this petition with that currently pending before this Court by petition for a writ of certiorari in the case of *Gustafson v. United States*, Supreme Court Docket No. 84-482, in which this same issue is raised.

As this Court stated in *United States v. Turkette*, 452 U.S. 576, 580 (1981) "[i]n determining the scope of a statute, we look first to its language." If unambiguous, the language suffices in determining the reach and interpretation of a statute. If certiorari were granted, we would urge in this Court that by including within the definition of racketeering activity, felonies involving "narcotics or other dangerous drugs," Congress intentionally omitted marijuana transactions from the reach of the RICO statute. As marijuana was included in early drafts of the RICO legislation, but was omitted from the bill as enacted, courts are not free to read into this statute more than what Congress intended by its choice of words. *American Textile Manufacturers Institute, Inc. v. Donovan*, 450 U.S. 490, 508-511 (1981). *See also Russello v. United States*, ____ U.S. ____, 104 S.Ct. 296, 300 (1983).

The Eleventh Circuit rejected this issue in its opinion by finding that it was "foreclosed" by a prior panel decision and that it was "not at liberty" to reconsider whether marijuana transactions are proper predicate acts under the RICO statute. *United States v. Bascaro*, 742 F.2d at 1343. This Court—which has never addressed the issue—is not so foreclosed.

This issue is an important one with far-reaching consequences in RICO prosecutions throughout the federal system. The intent of Congress in this regard warrants the judicial consideration that the Eleventh Circuit has refused to give it.

For these reasons, we pray this Court grant certiorari upon this issue as well.

CONCLUSION

For all the above and foregoing reasons, petitioner prays this Court order that a writ of certiorari issue to the United States Court of Appeals for the Eleventh Circuit in this case.

Respectfully submitted,
Albert J. Krieger
ALBERT J. KRIEGER, P.A.
1899 South Bayshore Drive
Miami, Florida 33133
(305) 854-0050

OF COUNSEL:

Laurel White Marc-Charles
Suite 4
521 South Andrews Avenue
Ft. Lauderdale, Florida 33301
(305) 523-6225

Attorneys for Petitioner
WALDROP

By ALBERT J. KRIEGER
ALBERT J. KRIEGER

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, postage prepaid, to:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Thomas Dillard
U.S. Attorney's Office
Suite 4014
227 No. Bronough Street
Tallahassee, Florida 32301

James M. Shellow
Shellow, Shellow & Glynn
222 E. Mason Street
Milwaukee, Wisconsin 53202

Loren Cohen
Suite 205
520 Brickell Key Drive
Miami, Florida 33131

Ronald A. Dion
1500 N.E. 162nd Street
No. Miami Beach,
Florida 33162

Geoffrey C. Fleck
2250 S.W. 3rd Avenue
Miami, FLorida 33129

this 17th day of January, 1985.

ALBERT J. KRIEGER

Albert J. Krieger

Appendix

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APPENDIX A

[1982 DEC 23]

United States District Court

NORTHERN DISTRICT OF FLORIDA

DOCKET NO. PCR 81-00440

United States of America vs. PATRICK C. WALDROP

In the presence of the attorney for the government the defendant appeared in person on this date April 26, 1982

WITH COUNSEL Albert Krieger

PLEA, X NOT GUILTY

There being a verdict of X GUILTY.

Defendant has been convicted as charged of the offense(s) of violating title 18 United States Code Sections 1962 and 2, and Title 21 United States Code Sections 841, 846, 952, 960, 963, as charged in Counts 1, 2, 3, 4, 5, 9, and 10 of the Indictment, within the times as set forth in the indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney

General or his authorized representative for imprisonment for a period of ten (10) years and pay a fine to the United States in the sum of $25,000, on Count 1. The defendant is ordered to stand committed until the fine is paid or he is otherwise discharged by due course of law.

On Count 2, the defendant is hereby committed for a term of ten (10) years and pay a fine to the United States in the sum of $25,000. The defendant is ordered to stand committed until the fine is paid or he is otherwise discharged by due course of law. Sentence imposed in Count 2 is to run consecutively to the sentence imposed in Court 1.

On Count 3, the defendant is hereby committed for a term of five (5) years and pay a fine to the United States in the sum of $15,000. The defendant is ordered to stand committed until the fine is paid or he is otherwise discharged by due course of law. Sentence imposed in Count 3 is to run consecutively to the sentences imposed in Counts 1 and 2.

On Count 4, the defendant is hereby committed for a term of five (5) years and pay a fine to the United States in the sum of $15,000. The defendant is ordered to stand committed unitl the fine is paid or he is otherwise discharged by due course of law. Sentence imposed in Count 4 is to run consecutively to the sentences imposed in Counts 1, 2 and 3.

It is further ordered that the defendant serve a special parole term of two (2) years.

On Count 5, the defendant is hereby committed for a term of five (5) years and pay a fine to the United States in the sum of $15,000. The defendant is ordered to stand committed until the fine is paid or he is otherwise discharged by due course of law. Sentence imposed in Count 5 is to run consecutively to the sentences imposed in Counts 1, 2, 3 and 4.

On Count 9, the defendant is hereby committed for a term of five (5) years and pay a fine to the United States in the sum of $15,000. The defendant is ordered to stand committed until the fine is paid or he is otherwise discharged by due course of law. Sentence imposed in Count 9 is to run consecutively to the sentences imposed in Counts 1, 2, 3, 4 and 5.

It is further ordered that the defendant serve a special parole term of two (2) years.

On Count 10, the defendant is hereby committed for a term of five (5) years and pay a fine to the United States in the sum of $15,000. The defendant is ordered to stand committed until the fine is paid or he is otherwise discharged by due course of law. Sentence of imprisonment imposed in Count 10 is to run concurrently with the terms of imprisonment imposed in Counts 1, 2, 3, 4, 5 and 9.

It is further ordered that the defendant serve a special parole term of two (2) years.

Total sentence imposed: Forty (40) years imprisonment; $125,000 fine; Two (2) years special parole term.

The court orders commitment to the custody of the Attorney General and recommends,

CERTIFIED A TRUE COPY
MARVIN S. WAITS, CLERK
By Teresa L Dean
Deputy Clerk
SIGNED BY
X U.S. District Judge
LYNN C. HIGBY
Date 12/23/82

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

v.

Antonio E. BASCARO, Patrick M. Waldrop, Russell Hobson, III, Manuel Eric Villanueva, Gustavo J. Fernandez, Manuel W. James, Defendants-Appellants.

UNITED STATES of America, Plaintiff-Appellant, Cross-Appellee,

v.

Manuel W. JAMES, Defendant-Appellee, Cross-Appellant.

Nos. 82-5547, 82-6043.

United States Court of Appeals, Eleventh Circuit.

Oct. 1, 1984.

Defendants were convicted in the United States District Court for the Northern District of Florida, William Stafford, Chief Judge, on drug conspiracy charges, and they appealed. The Court of Appeals, Clark, Circuit Judge, held that: (1) marijuana was proper subject matter of RICO charge; (2) probable cause existed for authorization of wiretap; (3) indictment was sufficiently specific; (4) procedure for impaneling of jury satisfied Sixth Amendment and applicable rules of criminal

procedure; (5) trial court's voir dire inquiry was adequate; (6) prosecutor's closing argument was proper; (7) any error in trial court's communications with jury during deliberation was harmless; (8) evidence sustained one defendant's continuing criminal enterprise conviction; (9) such defendant's convictions of lesser included conspiracy offenses would be vacated on double jeopardy grounds; and (10) evidence was sufficient to sustain two defendants' RICO convictions for conspiracy to import and conspiracy to possess with intent to distribute marijuana, and for importation and possession of marijuana with intent to distribute.

Affirmed in part, vacated in part.

1. Commerce—82.73

Marijuana was proper subject matter of RICO charge. 18 U.S.C.A. §§ 1961(1)(D), 1962.

2. Courts—96(4)

Defendants' proffering additional reasons not expressly considered previously for accepting particular statutory interpretation that was explicitly rejected by panel of Court of Appeals could not open door to reconsideration of the question by second panel of the Court of Appeals.

3. Criminal Law—956(1)

Evidence discovered posttrial, calling into question existence of probable cause for search conducted by law enforcement officers, is properly considered by

federal district court on motion for new trial pursuant to rule. Fed.Rules Cr.Proc.Rule 33, 18 U.S.C.A.

4. Criminal Law—950

A federal Court of Appeals is without authority to rule on motion for new trial. Fed.Rules Cr.Proc.Rule 33, 18 U.S.C.A.

5. Criminal Law—1134(3), 1181

Although federal Court of Appeals was without authority to rule on defendants' motion for new trial, it was nevertheless required to decide whether to remand for limited purpose of having district court entertain such a motion, and if remanding the case would serve no valid purpose, the Court of Appeals would decline to do so. Fed.Rules Cr.Proc.Rule 33, 18 U.S.C.A.

6. Criminal Law—945(1)

For defendants to prevail in district court on motion for new trial based upon newly discovered evidence, they must demonstrate, among other things, that the new evidence is such that it will probably produce an acquittal. Fed.Rules Cr.Proc.Rule 33, 18 U.S.C.A.

7. Telecommunications—515

Even if state law enforcement agent's affidavit in support of wiretap of unindicted coconspirator's telephone contained deliberate falsehoods, probable cause still existed for authorizing the wiretap where, of 46 items of information tending to link the unindicted coconspirator to an ongoing marijuana conspiracy, only seven were

called into question and the remaining items detailed mass of circumstantial evidence pointing to conclusion that the unindicted coconspirator was deeply involved in drug conspiracy.

8. Searches and Seizures—3.6(3)

Information furnished in application for search warrant must be timely, and probable cause must be found to exist at time the warrant issues; warrant application based upon stale information of previous misconduct is insufficient. U.S.C.A. Const.Amend. 4.

9. Searches and Seizures—3.6(3)

No mechanical test exists for determining when information furnished in application for search warrant becomes fatally stale; rather, issue of staleness must be decided on peculiar facts of each case. U.S.C.A. Const.Amend. 4.

10. Drugs and Narcotics—188

In cases involving large-scale drug trafficking operations, issue of staleness of information furnished in application for search warrant should be construed liberally. U.S.C.A. Const.Amend. 4.

11. Telecommunications—515

Viewed together and in light of ongoing investigation into drug conspiracy and in light of unindicted coconspirator's preexisting involvement with the conspiracy, evidence which included telephone message from unindicted coconspirator, calls made from unindicted

coconspirator's telephones, and changes in unindicted coconspirator's address and telephone numbers lent adequate basis for probable cause determination that the unindicted coconspirator remained part of the conspiracy and that his telephone was being used in connection with the conspiracy at time application for wiretap of unindicted coconspirator's telephones was submitted.

12. Federal Courts—404

Requirements of state and federal law governed federal district court's determination of validity of wiretap warrants obtained by state law enforcement officers in state courts. 18 U.S.C.A. § 2516(2).

13. Telecommunications—514

Under Florida law, enforcement agent's incorporation by reference of original wiretap order in two applications for amendment of the order did not render the applications insufficient where the reason for the applications was that the subject had changed his telephone number and where the subject had not changed his residence. West's F.S.A. §§ 934.01 et seq., 934.09(1)(c); 18 U.S.C.A. §§ 2510 et seq., 2516(2), 2518(1)(c).

14. Indictment and Information—71.4(3)

Indictment which recited essential elements of knowingly conspiring to distribute marijuana and to possess marijuana with intent to distribute and which identified alleged coconspirators, set forth time span of the conspiracy, and which described the locale of the alleged conspiracy was sufficiently specific to inform

defendants of charges against them and to enable them to formulate coherent objection on double jeopardy grounds. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 401(a), 406, 21 U.S.C.A. §841, 841(a), 846; U.S.C.A. Const.Amend. 5.

15. Criminal Law—636(3), 641.3(4)

A defendant's rights to be present and to be represented by counsel at every stage of proceedings against him, including impaneling of jury, necessarily extend to that phase of jury selection process involving exercise of peremptory strikes. Fed.Rules Cr.Proc.Rules 43, 43(a), 44, 44(a), 18 U.S.C.A.; U.S.C.A Const.Amend. 6.

16. Jury—136(6)

Jury selection procedure by which co-defendants were permitted jointly to exercise 15 peremptory strikes, including ten as matter of right under rule and additional five in discretion of trial court, comported with rule governing procedures for exercise of peremptory challenges. Fed.Rules Cr.Proc.Rules 24, 24(b), 18 U.S.C.A.

17. Criminal Law—641.3(4)

Defendants were not deprived of their right to counsel during exercise of peremptory strikes in jury selection process where, although court told counsel at pretrial conference that they would have opportunity to confer among themselves before exercising peremptory challenges, and counsel took advantage of that opportunity, nothing prevented counsel from speaking with their clients after they had conferred informally among themselves, before they made their strikes.

Fed.Rules Cr.Proc.Rules 43, 43(a), 44, 44(a), 18 U.S.C.A.; U.S.C.A. Const.Amend. 6.

18. Criminal Law—636(3)

Defendants were not denied right to be present during peremptory strike phase of jury selection where counsel left the courtroom briefly to confer but defendants were in the courtroom when voir dire questioning took place and again when peremptory strikes were given actual effect by clerk's reading off the list, defendants had opportunity to discuss their misgivings with counsel during or immediately following the impanelling process, and where no objection was made at the time to defendants' absence from the informal peremptory strike conference. Fed.Rules Cr.Proc.Rule 43, 18 U.S.C.A.; U.S.C.A. Const.Amend. 6.

19. Jury—131(4)

Federal rule which grants district court latitude to ask or have asked of prospective jurors such questions "as it deems proper" vests considerable discretion in the court to determine appropriate method and scope of voir dire; that discretion, however, is not boundless. Fed.Rules Cr.Proc.Rules 24, 24(a), 18 U.S.C.A.

20. Jury—131(17)

In drug conspiracy prosecution based upon series of incidents involving importation of marijuana, trial court voir dire adequately inquired into juror bias toward marijuana by asking whether any prospective jurors felt so strongly about drug laws that they could not

base verdict solely on evidence, argument of counsel, and court's charge.

21. Jury—131(17)

In voir dire phase of drug conspiracy prosecution based upon series of incidents involving importation of massive quantities of marijuana, trial court's general inquiry into jurors' opinions respecting drug offenses was sufficient to disclose relevant prejudices, and it was well within trial court's discretion not to pursue matter of jurors' attitudes toward the quantity of marijuana at issue, especially in light of fact that defendants never requested that such a question be posed.

22. Criminal Law—655(4)

Trial court's inquiries and admonitions upon voir dire concerning purpose and effect of grand jury indictment did not strip defendants of their presumption of innocence, but rather, when placed in context, protected defendants' presumption of innocence.

23. Criminal Law—1171.1(2)

In order for claim of prosecutorial misconduct during closing argument to warrant reversal, challenged remarks must be improper and prejudicial to substantial right of defendant.

24. Criminal Law—726

In drug conspiracy prosecution based upon series of incidents involving importation of massive quantities

of marijuana, prosecutor's statements in closing argument likening drug problem to war or enemy invasion, and statement that he was interested in justice and not convictions for their own sake, were permissible as responses to defense counsel's suggestion that the prosecution was a show put on by government counsel for their own amusement.

25. Criminal Law—726

When prosecutor goes no further than to take defense counsel up on his invitation, his conduct will not be regarded as impermissibly calculated to incite passions of the jury.

26. Criminal Law—723(1)

Prosecutorial appeals for jury to act as "the conscience of the community" were not impermissible where they were not calculated to inflame.

27. Criminal Law—723(1)

It is not impermissible to simply compare duties of citizens serving on juries with those of citizens serving in the armed forces.

28. Criminal Law—723(2)

In drug conspiracy prosecution, prosecutor's reference in closing argument to "tons and tons" of marijuana being "dumped" on the community was nothing more than permissibly colorful way to describe the fact amply borne out in the record.

29. Criminal Law—864

In drug conspiracy prosecution, it was proper for trial court to inquire into whether jury had reached partial verdict after counsel had been notified and had been given opportunity to object; moreover, any coercive or otherwise improper impact of the court's written inquiry was neutralized by the court's later remarks when jury was returned to courtroom.

30. Criminal Law—1174(1)

Although it would have been preferable for trial court to have informed defense counsel of communications from jury and afforded them opportunity to be heard before returning written responses, the court's answers were distinctly responsive to the jury's questions, and as such were at most harmless error.

31. Criminal Law—641.12(2), 1166.11

Agreement negotiated by United States Attorney wherein the United States Attorney agreed not to oppose defendant's motion to reduce bond in return for opportunity to speak with defendant privately outside presence of his counsel constituted coerced rather than voluntary waiver of defendant's Sixth Amendment rights, and as such was wholly improper; however, defendant was not prejudiced since the district court suppressed information obtained from defendant in defense counsel's absence. U.S.C.A. Const.Amend. 6.

32. Conspiracy—47(12)

In prosecution for engaging in a continuing criminal enterprise based upon series of incidents involving importation of massive quantities of marijuana, evidence, including testimony of two of defendant's former coconspirators concerning defendant's supervisory role in the conspiracy, was sufficient to sustain conviction. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 101 et seq., 408 as amended, 21 U.S. C.A. §§ 801 et seq., 848.

33. Criminal Law—199

Conviction of defendant both for engaging in continuing criminal enterprise and for lesser included offenses of conspiracy to import and conspiracy to possess with intent to distribute marijuana violated double jeopardy principles, and thus, convictions and sentences of the lesser included conspiracy offenses would be vacated. U.S.C.A. Const.Amend. 5; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 101 et seq., 406, 408, 1002, 1003, 1013, as amended, 21 U.S.C.A. §§ 801 et seq., 846, 848, 848(b), 952, 953, 963.

34. Conspiracy—40.1

In order for defendant to be found guilty of conspiracy, the Government must demonstrate that a conspiracy existed, that defendant had knowledge of it, and that he or she voluntarily became a part of it.

35. Conspiracy—47(2)

Existence of a conspiracy may be demonstrated by circumstantial evidence such as inferences from conduct of defendant or circumstances indicating scheme or plan.

36. Conspiracy—40.1

"Knowledge" element of conspiracy refers simply to knowledge of essential objective of the conspiracy; a defendant may be found gulty notwithstanding that he did not have knowledge of all details of the conspiracy or played only minor role in the total operation.

See publication Words and Phrases for other judicial constructions and definitions.

37. Conspiracy—44½

Although existence of simple buyer-seller relationship alone does not furnish requisite evidence of conspiratorial agreement, where buyer knowingly assumes a role instrumental to success of conspiracy, jury may properly infer that he is a member in it.

38. Conspiracy—47(12)

In prosecution for conspiracy to import and conspiracy to possess with intent to distribute marijuana, evidence that two defendants were among selling group's best buyers, that they purchased from the selling group on numerous occasions, that they maintained close relationship with the selling group, and that the success of the selling group's endeavors depended upon

participation and cooperation of the two defendants was sufficient to support conclusion that the two defendants had entered into conspiratorial agreement with the other codefendants. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a), 406, 1002(a), 1013, as amended, 21 U.S.C.A. §§ 841(a), 846, 952(a), 963.

39. Conspiracy—28(3)

In order to be guilty of conspiring to import a controlled substance, defendant must have known that the substance was imported. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1013, as amended, 21 U.S.C.A. § 963.

40. Conspiracy—47(1, 2)

A defendant will not be held to have knowledge of an illegal importation of a controlled substance solely on basis of evidence that one or more of his alleged coconspirators had such knowledge; nevertheless, direct or circumstantial evidence may justify an inference of knowledge. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1013, as amended, 21 U.S.C.A. § 963.

41. Conspiracy—47(12)

In prosecution for conspiracy to import and conspiracy to possess with intent to distribute marijuana, evidence that two defendants' codefendants were aware that the marijuana in question was imported, together with evidence of massive quantity of marijuana involved, frequency with which the two defendants had occasion to deal with other members of the enterprise, fact that the two defendants and another were described as principal organizers, and presence of both defendants

at various of the organization's stash houses on numerous occasions, was sufficient to support finding that the two defendants knew that the marijuana was imported. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1013, as amended, 21 U.S.C.A. § 963.

42. Criminal Law—29

Possessing and importing marijuana are two separate crimes and consequently two separate acts for purposes of the RICO statute. 18 U.S.C.A. § 1962(c, d).

43. Commerce—82.73

Existence of an enterprise is an element of a RICO violation distinct from the element of pattern of racketeering activity in which the enterprise engages. 18 U.S.C.A. § 1962(c).

44. Conspiracy—48.2(2)

In RICO prosecution predicated upon possession of marijuana with intent to distribute, in connection with one venture, and upon importation and possession of marijuana with intent to distribute in connection with another venture, instruction describing enterprise in question in terms of group of named individuals who were associated in fact for purpose of importing and distributing marijuana could not have been misunderstood to permit jury to ascribe to the enterprise smuggling ventures independently undertaken by one or more of its members, 18 U.S.C.A. § 2518(1)(c); West's F.S.A. § 934.09(1)(c); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401, as amended, 21 U.S.C.A. § 841.

45. Criminal Law—1173.1

A district court's refusal to deliver a defendant's requested instruction will constitute reversible error

if and only if the requested instruction is correct, is not substantially covered by other instructions which were delivered, and deals with some point in the trial so vital that the failure to give the requested instruction seriously impaired defendant's ability to defend.

46. Criminal Law—829(4)

In RICO prosecution predicated on possession of marijuana with intent to distribute and importation and possession of marijuana with intent to distribute, only difference between defendants' requested "theory of defense" instruction and instruction given was that the instruction given defined the "enterprise" in question in terms of its participants and purpose instead of its organizers, which was not a difference so vital as to impair defendants' ability to defend under the instruction delivered and thus, it was not error to refuse to give the requested instruction. 18 U.S.C.A. § 1962(c, d), Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401, as amended, 21 U.S.C.A. § 841.

47. Commerce—82.74

In RICO prosecution predicated upon possession of marijuana with intent to distribute, in connection with one venture, and importation and possession of marijuana with intent to distribute in connection with a second venture, evidence, including that the second venture was headed by self-described leader of the enterprise in question, and that counsel for virtually all of the affairs of the enterprise was called upon to serve as counsel to the participants in the second venture, was sufficient to sustain conviction. 18 U.S.C.A. § 1962(c, d); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401, as amended, 21 U.S.C.A. § 841.

48. Drugs and Narcotics—123

In prosecution for possession of marijuana with intent to distribute, evidence on question of defendant's exercise of dominion and control over the marijuana in question was sufficient to sustain conviction. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401, as amended, 21 U.S.C.A. § 841.

49. Drugs and Narcotics—123

In prosecution for possession of marijuana with intent to distribute, although evidence that defendants had made deposit of $1,500,000 on incoming shipment of marijuana did not satisfy requirement that they exercised dominion and control over the marijuana, defendants were properly convicted of possession under an aiding and abetting theory, in view of evidence that defendants associated themselves with the venture and sought by their actions to make the venture succeed. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401, as amended, 21 U.S.C.A. § 841.

50. Criminal Law—204

Defendant waived double jeopardy defense by failing to assert it at trial. U.S.C.A. Const.Amend. 5.

51. Criminal Law—204

District court's denial of defendant's motion for bill of particulars could not justify defendants' failure to raise double jeopardy defense at trial. U.S.C.A. Const.Amend. 5.

52. Indictment and Information—121.2(3, 7)

In drug conspiracy prosecution, defendant's motion for bill of particulars with respect to his activities in connection with smuggling episode for which he had been previously convicted was properly denied since acts committed by defendant in connection with the episode for which he was previously tried were not included among overt acts listed in the present indictment because those acts were not part of the present indictment.

Appeals from the United States District Court for the Northern District of Florida.

Before HENDERSON and CLARK, Circuit Judges, and ATKINS*, District Judge.

CLARK, Circuit Judge:

Appellants were tried and convicted in the Northern District of Florida on drug conspiracy charges. Their convictions are founded upon a series of incidents taking place in 1977 and 1978, involving the importation of massive quantities of marijuana into the United States from Colombia, South America.[1]

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*Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

[1]One co-conspirator who turned state's evidence estimated the quantity of marijuana imported during the time of his involvement with the defendants as between .75 and 1.5 million pounds.

Generally stated, the appellants, together with six other individuals (four of whom have either pled guilty or have been separately tried and convicted, and two of whom remain fugitives), were charged in a thirty-count indictment in connection with their alleged involvement in a drug smuggling ring. Evidence adduced at trial indicates that appellants Bascaro and Villanueva, together with one Jose Acosta, who was separately tried and convicted, were the organizers and principal decision makers of the enterprise. Appellant Fernandez was responsible for overseeing the purchase of vessels to haul marijuana, and the hiring of crews to operate such vessels. Marijuana procured in Colombia and brought into the United States on board various vessels was purchased by appellants Hobson and Waldrop, among others, from an unindicted co-conspirator, Bill Cobb. Appellant James, an attorney, was the functional equivalent of "house counsel" for the group; James furnished legal advice, prepared documentation on fishing vessels owned by organization participants, and represented group members in criminal matters arising in connection with enterprise dealings.

James was convicted on one count only—conspiracy to possess marijuana with intent to distribute.[2] All other defendants were found guilty of conspiracy to violate the Racketeering Influenced and Corrupt Organizations Act (RICO)[3]; completed RICO substantive

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[2] 21 U.S.C. §§ 841(a); 846.

[3] 18 U.S.C. § 1962(d).

offenses[4]; conspiracy to import marijuana[5]; possession of marijuana with intent to distribute[6] (Bascaro—four counts; Villanueva, Fernandez and Waldrop—two counts; Hobson—one count); and with the exception of Bascaro, conspiracy to possess marijuana with intent to distribute.[7] In addition, Bascaro and Villanueva were convicted of engaging in a continuing criminal enterprise[8] and interstate travel in aid of racketeering enterprises,[9] and Hobson and Waldrop were convicted of importing marijuana.[10]

The appellants raise a myriad of issues on appeal, a number of which have been adopted by some or all defendants, and others that apply only to one or two defendants in particular. We shall first address those issues common to all or nearly all appellants.

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[4]18 U.S.C. § 1962(c).

[5]21 U.S.C. §§ 952(a); 963.

[6]21 U.S.C. § 841.

[7]21 U.S.C. §§ 841(a); 846.

[8]21 U.S.C. § 848.

[9]18 U.S.C. § 1952.

[10]18 U.S.C. § 952(a).

I. In General—Marijuana Related Offenses as a Basis for Prosecution Under RICO

The Racketeering Influenced and Corrupt Organizations ACT (RICO), 18 U.S.C. § 1962, makes it unlawful to conduct or participate in the conduct of an enterprise affecting interstate commerce, through a pattern of racketeering activity, and also makes it a crime to conspire to do so. Racketeering activity is defined in terms of a laundry list of offenses, including "the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in *narcotic or other dangerous drugs*, punishable under any law of the United States." 18 U.S.C. § 1961(1)(D) (emphasis supplied).

Joining appellant Hobson in his brief to this court is G. Robert Blakey, a professor of law of Notre Dame and a principal drafter of the RICO statute. Professor Blakey argues that marijuana offenses do not qualify as racketeering activity under RICO, because Congress did not intend the phrase "narcotic or other dangerous drugs" to include marijuana offenses. In support of his position, he points out that proposed drafts of the Act, listing marijuana in addition to narcotic and other dangerous drugs, were considered but ultimately rejected, and that in the federal wiretap statute, which Professor Blakey also had a hand in drafting, wiretaps were authorized for suspected offenses involving "narcotic drugs, *marihuana*, or other dangerous drugs." 18 U.S.C. § 2516(e) (emphasis supplied). Since Congress separately listed marijuana alongside narcotic or other dangerous drugs in the wiretap statute, its failure to do so in the

RICO statute, the argument goes, reflects a congressional intent to exclude marijuana offenses from coverage under the Act.

[1, 2] Our consideration of the appellants' argument is foreclosed by *United States v. Phillips*, 664 F.2d 971 (5th Cir. Unit B 1981). In *Phillips*, as here, it was argued that RICO did not apply to marijuana offenses. The holding in *Phillips* was explicit: "Marijuana may be the subject matter of a RICO charge," *Phillips* 664 F.2d at 1040. The appellants argue that *Phillips* is not controlling, because there, the basis for the defendant's claim was that marijuana is neither a narcotic nor a dangerous drug in fact, whereas here, the claim is grounded in legislative history and intent. However, the mere act of proffering additional reasons not expressly considered previously for accepting a particular statutory interpretation that has been explicitly rejected by a panel of our court, will not open the door to reconsideration of the question by a second panel. In short, *Phillips* held that marijuana *may* be the subject matter of a RICO charge; we are not at liberty to hold that it may not.

II. Issues Relating to Matters Arising Prior to Trial

A. The Wiretap

On January 5, 1979, Florida law enforcement agent Stephen Dobson applied for and received authorization from a Florida circuit court judge to intercept telephone conversations on two telephones listed to unindicted co-conspirator Bill Cobb, for a period of thirty days. Within that thirty-day period, Cobb had the numbers on both his telephones changed; the telephone company

refused to intercept the new numbers without new court orders, and so Dobson returned to court on January 15 and 29 and obtained amendments to the January 5 order, substituting the new numbers for the old. On February 2, 1979, Dobson applied for and was granted a thirty-day extension of the amended January 5 authorization, and it was during the extension period that certain telephone calls were intercepted incriminating several of the appellants.

1. Newly discovered evidence that the wiretap order was issued on the basis of false information

The appellants' initial challenge respecting the sufficiency of the wiretap application concerns what might best be termed "newly discovered evidence." Dobson's original affidavit relied in part upon information obtained from an informant, Rayburn Morgan. In the affidavit, Dobson alleged that he interviewed Morgan on December 5, 1978, and credits Morgan with having furnished certain details of Cobb's involvement in the marijuana conspiracy prior to July 1978.

In April 1983, several months after the conclusion of trial and while this appeal was pending, the defendants located Rayburn Morgan, and obtained his affidavit. Morgan stated that he did not make "many" of the statements attributed to him in the Dobson affidavit, and listed those statements with which he took issue. He added that he had reason to believe Cobb intended to kill him, for which reason he had been in hiding since the spring of 1978, and had made himself unavailable to all but the government prosecutors.

On the basis of this newly discovered evidence, appellants insist that the Dobson affidavit failed to establish the probable cause needed to authorize a wiretap on Cobb's phone. Consequently, appellants continue, this court should remand the case to the district court, presumably for a determination of whether a new trial is in order.

[3] Evidence discovered post-trial, calling into question the existence of probable cause for a search conducted by law enforcement officers, is properly considered by the district court in a motion for a new trial pursuant to Fed.R.Crim.Pro. 33. *See, e.g., United States v. VanMaanen*, 547 F.2d 50, 52-53 (8th Cir.1976). Rule 33 provides, however, that where, as here, such a motion is filed with the district court during the pendency of an appeal, the motion may be denied but not be granted without first having the case remanded by the court of appeals. *United States v. Fuentes-Lozano*, 580 F.2d 724 (5th Cir.1978); *see generally* C. Wright, *Federal Practice and Procedure* § 557 (1982).

[4, 5] For our part, a court of appeals is without authority to rule on a motion for a new trial. *United States v. Boberg*, 565 F.2d 1059, 1062 (8th Cir.1977). We must nevertheless decide whether to remand the case for the limited purpose of having the district court entertain such a motion, and if remanding the case would serve no valid purpose, we will decline to do so. *United States v. Mack*, 695 F.2d 820, 823 (5th Cir.1983).

[6, 7] For the appellants to prevail in the district court on a motion for a new trial based upon newly discovered evidence, they must demonstrate, among other things, that the new evidence is such that it will

probably produce an acquittal. *Bentley v. United States*, 701 F.2d 897 (11th Cir.1983); *United States v. Hirst*, 668 F.2d 1180, 1185 (11th Cir.1982). In order for such a result to be likely in this case, appellants must demonstrate, at the very least, that suppression of the wiretap evidence was warranted in light of information contained in Morgan's affidavit. Because we do not believe that the affidavit alone could properly result in suppression of the wiretap, it is unnecessary to remand the question to the district court for its consideration.

In *Franks v. Delaware*, the Supreme Court summarized the standard applicable for determining whether a defendant is entitled to a hearing upon his allegation that a search warrant was issued on the basis of a false affidavit:

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any non-governmental informant. Finally, *if these requirements*

are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing.

438 U.S. 154, 171-72, 98 S.Ct. 2674, 2684-85, 57 L.Ed.2d 667 (1978) (footnote omitted) (emphasis supplied).

Assuming without deciding that Morgan's affidavit supports a claim of deliberate falsehood, and setting aside all references in Dobson's affidavit to the Morgan interview (which would be unnecessary even if everything in Morgan's affidavit was taken as true, given that Morgan makes it clear, at least by implication, that he does not question all statements attributed to him), the information remaining would still be sufficient to sustain a probable cause determination. In support of his application for wiretap, Agent Dobson furnished forty-six pieces of information tending to link Bill Cobb to an ongoing marijuana conspiracy. Of those forty-six items, only seven had any connection to Rayburn Morgan. The remaining thirty-nine detail the circumstantial evidence amassed pointing to the conclusion that Cobb was deeply involved in a drug conspiracy: a pattern of telephone calls to and from Cobb's residence to other suspected co-conspirators at times when marijuana smuggling ventures were coming to fruition; Cobb's purchase, ownership or use of several items of real and personal property employed by suspected co-conspirators to house and transport themselves and their marijuana; and details of an ongoing drug investigation in Maryland

involving Cobb, among others, culminating in an arrest of several of the participants.

While no one item of information recounted above might have been sufficient standing alone to justify a wiretap order, taken together, they amply set out probable cause to believe that Cobb was involved in a marijuana conspiracy. Because probable cause to issue the wiretap order existed irrespective of information allegedly obtained from Morgan, the statements credited to Morgan, whether true or false, could not alter the trial court's determination that probable cause existed to authorize a wiretap. We therefore find it unnecessary to remand the question to the lower court for an evidentiary hearing.

2. The initial wiretap application and the staleness of information supporting probable cause

The appellants' second objection to the wiretap is that the application for authorization was supported by stale information. It is their contention that even if Dobson's affidavit amply demonstrated Cobb's involvement in the conspiracy through June of 1978, it failed to provide probable cause to believe that he continued to be involved when the wiretap was authorized seven months later.

Information contained in Dobson's affidavit relating to Cobb's involvement in the conspiracy after June, 1978, is as follows: The affidavit indicated that from July through November 1978 a consistent pattern of telephone calls continued to be made from Cobb's telephones to persons previously linked to the conspiracy. In that time, Cobb changed his principal residence and

telephone numbers several times, which Dobson indicated in his experience was a common practice of persons engaged in illegal operations, done in an effort to impede detection by law enforcement personnel. Finally, on November 24, a slip of paper was found in the pocket of one James Posey, at the time of his arrest in connection with a smuggling operation linked to the conspiracy previously connected to Cobb, on which was written Cobb's telephone number, and the message: "Bill called—emergency 1:30 (expletive deleted) panic."

[8] It remains a fundamental principal of search and seizure law that information furnished in an application for a search warrant must be timely, and that probable cause must be found to exist "at the time the warrant issues." *United States v. Hyde*, 574 F.2d 856, 864 (5th Cir.1978). A warrant application based upon stale information of previous misconduct is insufficient, because it fails to create probable cause that similar or other improper conduct is continuing to occur. *United States v. Weinrich*, 586 F.2d 481, 491 (5th Cir. 1978).

[9, 10] No mechanical test exists for determining when information becomes fatally stale; rather, "staleness is an issue which must be decided on the peculiar facts of each case." *Hyde*, 574 F.2d at 865; *Weinrich*, 586 F.2d at 491.

> In general, the basic criterion as to the duration of probable cause is the inherent nature of the crime. The circuits hold that where an affidavit recites a mere isolated violation then it is not unreasonable to believe that probable cause quickly dwindles with

> the passage of time. On the other hand, if an affidavit recites activity indicating protracted or continuous conduct, time is of less significance.

Bastida v. Henderson, 487 F.2d 860, 864 (5th Cir.1973). Protracted and continuous activity is inherent in large-scale drug trafficking operations. *United States v. Tehfe*, 722 F.2d 114, 119 (3d Cir.1983). In such cases, then, the staleness issue should be construed liberally. *Id.* at 1120.

[11] In light of the liberal treatment properly accorded the staleness issue in a large drug conspiracy operation such as this, evidence of Cobb's continued complicity in the marijuana conspiracy in the seven months preceding the application was sufficient to support a finding of probable cause to authorize the wiretap. While the telephone message from Cobb found in Posey's pocket, the calls made from Cobb's telephones, and changes in Cobb's address and telephone numbers are subject to an innocent interpretation when viewed in isolation, in light of the ongoing investigation and Cobb's preexisting involvement with the conspiracy, such additional circumstantial evidence lent adequate basis for a probable cause determination that Cobb remained a part of the conspiracy and that his telephone was being used in connection with that conspiracy at the time the wiretap application was submitted. *United States v. Todisco*, 667 F.2d 255, 258 (2d Cir.1981).

3. The amended wiretap application and its sufficiency under federal and state law

The appellants' final objection to the wiretap concerns the sufficiency of the January 15 and 29 applications

for amendment of the January 5 authorization order. They argue that the amendment applications violated Florida law, in that they improperly incorporated by reference documents relating back to the original January 5 application.[11]

Before the January 5 order had been acted upon and the wiretap was in place, Cobb had one of his telephone numbers changed. Consequently, on January 15, Dobson returned to the circuit judge who had issued the original order, and applied for an amended order reflecting the new telephone number. In his affidavit in support of the application for amendment, Dobson attached a copy of the original wiretap order, incorporated it by specific reference, and explained why that order needed to be amended. The court thereupon issued the amended order. A nearly identical sequence of events occurred later in the month: Cobb had the number on his second telephone changed, Dobson returned to court on January 29 with an application to amend the January 5 order, and the court amended its order accordingly.

[12] The first question to be answered is whether federal or state law governs a federal district court's ruling in a federal drug conspiracy case on the sufficiency of a wiretap application approved by a state court and submitted by a state law enforcement agent. Both the United States and the state of Florida have enacted wiretap authorization statutes. *See* 18 U.S.C.A. § 2510

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[11]To the extent that the amendment application cannot "piggyback" on the original, appellants make the related argument that the amendment was not properly authorized, in that only the original was officially approved by an appropriate state official.

et seq.; FSA § 934.01 *et seq.* Title 18 U.S.C. § 2516(2) provides in pertinent part:

> The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter *and with the applicable State statute* an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which application is made ...

(emphasis supplied). Two courts of appeals have expressly held that the federal statute requires federal courts to defer to state law on the question of the validity of wiretap orders obtained in state court by state law enforcement agents, to the extent that state requirements are the more rigorous. *United States v. McNulty*, 729 F.2d 1243, 1264 (10th Cir.1984) (en banc); *United States v. Marion*, 535 F.2d 697 (2d Cir.1976). In *United States v. Nelligan*, our court tacitly approved "the Second Circuit's conclusion that state law governs the validity of state warrants issued by state courts" as an exception to "the general rule that federal law governs the admissibility of wiretap evidence in federal criminal cases." 573 F.2d 251, 254 (5th Cir.1978). We agree with the interpretation given the statute by our brethen in the Second and Tenth Circuits, and therefore make explicit what was only implicit in *Nelligan:* that the

requirements of state and federal law govern a federal district court's determination of the validity of wiretap warrants obtained by state law enforcement officers in state courts.

As previously noted, the state circuit court approved Agent Dobson's applications to amend the original January 5 wiretap authorization order, on the basis of affidavits that incorporated by reference the January 5 order and stated that an amendment to that order was necessary because the subject of the wiretap had changed his telephone number. The appellants do not suggest that this procedure would run afoul of federal law, but contend that it did not violate the more rigorous Florida requirements. In support of their position, appellants have brought to our attention two Florida court of appeals decisions applying the state wiretap statute, and invalidating wiretap order amendment applications that incorporated by reference documents from the original application. *Bagley v. State*, 397 So.2d 1036 (Fla.App.1981); *Wilson v. State*, 377 So.2d 237 (Fla.App. 1979).

In both *Wilson* and *Bagley*, the original wiretap applications submitted by the state were sufficient in all respects and were properly approved. Among the requirements satisfied, was that the applicant furnish "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or be too dangerous"—a requirement common to the Florida and federal statutes. § 934.09(1)(c), Fla.Stats.; 18 U.S.C. § 2518(1)(c). Before the thirty-day time period on the original orders had run, the subjects of the wiretaps in *Bagley* and *Wilson* changed residence

and telephone number, forcing the state to return to court with applications to amend the existing orders. In neither amendment application did the state reassert that other investigative procedures continued to be too dangerous or unlikely to succeed. Rather, they simply incorporated by reference statements to that effect from the original application.

The Florida courts of appeals held that the amendment applications were insufficient. The rationale for that conclusion, implicit in both opinions, is that when a suspect changes residence, the circumstances that previously made other investigative procedures dangerous or unlikely to succeed may no longer exist, thus requiring the state to assert new facts in its amendment application demonstrating that conventional investigative techniques continue to be dangerous or ineffective. As the *Bagley* court observed: "In the original application for wiretap, the affiant declared that it was difficult to surveil Bagley's residence because there were no positions the affiant could sit without being detected. The amendment makes no refence at all to the success or failure of the surveillance techniques employed at the new location. The amendment also fails to state why routine methods of surveillance could not be used at the new location." 397 So.2d at 1038.

[13] Unlike the subjects of the wiretaps in *Bagley* and *Wilson*, Cobb changed only his telephone number. As distinguished from a change in residence, a change in telephone number only could not conceivably have affected the efficacy of alternative investigative techniques. Nor in the context of this case could such a change call into question the continued existence of probable cause—to the contrary, in his initial application,

Agent Dobson pointed to Cobb's frequent changes in telephone number as evidence of his continued involvement in illicit activities.

The foregoing comparison of *Bagley* and *Wilson* to the instant case leads us to conclude that Dobson's amendment applications were sufficient under Florida law. The naked formality of restating information in the amendment that would, in the context of this case, necessarily be identical in every respect to that presented one or two weeks before to the same circuit judge in the original application was not indispensable.

B. The Indictment

[14] Count V of the indictment provided in its entirety:

COUNT FIVE

The Grand Jury further charges that:

Commencing during January, 1977 and continuing thereafter up to and including the date of the filing of this indictment, within the Northern District of Florida, and elsewhere, MANUEL ERIC VILLANUEVA, JOSE LUIS ACOSTA, MANUEL W. JAMES, GUSTAVO J. FERNANDEZ, CLIFFORD B. WENTWORTH, CARLTON C. REEVES, JAMES L. SELLERS, JOHN M. ARANEO, PATRICK C. WALDROP, RUSSELL HOBSON, and RENE BENITEZ, defendants herein, did unlawfully, willfully and knowingly conspire,

> combine, confederate and agree together, with each other and with divers other persons known and unknown to the Grand Jury, to distribute and to possess with intent to distribute, marihuana, a Schedule I controlled substance in violation of Title 21, United States Code, Section 841(a), all in violation of Title 21, United States Code, Section 846.

The appellants' objection is that in the absence of more detailed factual allegations, Count V was constitutionally insufficient in that it failed to put the defendants on notice of the events giving rise to the crime charged. Along similar lines, the appellants complain that they had previously been tried with respect to the incidents forming the basis for the charge, but that the indictment was so unspecific that they were unable to formulate a coherent objection on double jeopardy grounds.

Defendants' contentions need not detain us long. In *United States v. Yonn*, our court conclusively resolved this very issue adversely to appellants:

> To pass constitutional muster, an indictment must be sufficiently specific to inform the defendant of the charge against him and to enable him to plead double jeopardy in any future prosecutions for the same offense. (citation omitted). Those requirements are satisfied by an indictment that tracks the wording of the statute, as long as the language sets forth the essential elements of the crime. (citations omitted). In addition, "an indictment for conspiracy to commit a criminal offense need not be as specific as a substantive count." (citation omitted).

> Against this background, the indictment here meets the test of specificity. Count II recites the essential elements of the offense charged against Sanes-Saavedra—knowingly conspiring to import a schedule I controlled substance into the United States, in violation of 21 U.S.C. §§ 952(a) and 963. It identified his alleged co-conspirators as well as the particular controlled substance. (citation omitted). The indictment also correctly set forth the time span of the conspiracy: from June 1, 1981 until the date of the indictment (November 24, 1981). (citations omitted). It further described the locale of the alleged conspiracy, at least partially, with the allegation that the criminal activity took place "in the Northern District of Florida and elsewhere." Taken as a whole, these allegations adequately set forth the offense charged.

702 F.2d 1341, 1348 (11th Cir.1983).

C. Impaneling of the Jury

1. The peremptory strike procedure

At the pretrial conference, the district court gave counsel for appellants a choice in the exercise of their peremptory challenges. Either they could exercise three challenges apiece without conferring among themselves prior to announcing the strikes each intended to make (for a maximum total of eighteen challenges, or a minimum of three, depending upon the extent to which the strikes overlapped), or they could collectively exercise fifteen strikes after consultation. Appellants chose the latter option and now contend that because the collective

decision making process required lawyers-only conferences and decision making outside the earshot of their clients, the appellants were denied their right to be represented by counsel and to be present at a critical stage in the proceedings.

[15] Rules 43 and 44 of othe Federal Rules of Criminal Procedure embody a criminal defendant's rights under the sixth amendment to the United States Constitution to be present and to be represented by counsel at every stage of the proceedings against him, including the impaneling of the jury. Fed.R.Crim.P. 43(a), 44(a); *Illinois v. Allen*, 397 U.S. 337, 338, 90 S.Ct. 1057, 1058, 25 L.Ed.2d 353 (1970); *United States v. Chrisco*, 493 F.2d 232 (8th Cir.1974). Those rights necessarily extend to that phase of the jury selection process involving the exercise of peremptory strikes. *Chrisco*. 493 F.2d at 236-37.

[16] Rule 24(b) outlines the appropriate procedures for exercise of peremptory challenges:

> If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges . . . If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

Fed.R.Crim.Pro. 24(b). The procedure utilized in the appellants' trial comported with Rule 24: the defendants were permitted jointly to exercise fifteen peremptory strikes—ten as a matter of right under the rule, and an

additional five in the discretion of the trial court because there was more than one defendant involved. Appellants do not dispute this, but argue nevertheless that because the lawyers conferred among themselves outside the courtroom before exercising their peremptory strikes, their clients were simultaneously denied access to counsel and their right to be present.

[17] We disagree. Nothing in the record suggests that counsel were rendered unable to confer with their clients in the course of the peremptory strike process. At the pretrial conference, the court told counsel that "I will give you an opportunity to confer among yourselves back in the back outside the hearing of everybody before you have to exercise your peremptory challenges," and at the voir dire, counsel took advantage of that opportunity. Nothing prevented counsel from speaking with their clients after they had conferred informally among themselves, before they made their strikes. Under these circumstances, we are unable to conclude that the appellants were deprived of their right to counsel. *United States v. Alessandrello*, 637 F.2d 131, 144 (3d Cir.1980); *Chrisco*, 493 F.2d at 237.

[18] We likewise hold that the defendants were not denied their right to be present during the peremptory strike phase of jury selection. This case is quite close on its facts to the Eighth Circuit's decision in *United States v. Chrisco*, 493 F.2d 232 (8th Cir.1974). In *Chrisco*, the defendants were absent from the courtroom when their counsel informally conferred and made their peremptory strikes (a situation somewhat more troubling than in the instant case, where the defendants were in the courtroom at all times, and counsel left briefly to confer). The *Chrisco* court nevertheless held that the

defendants had not been denied their right to be present for the peremptory strike phase of the jury selection process, in light of the following facts: the defendants were in the courtroom when the voir dire questioning took place and again when the peremptory strikes were given actual effect by the clerk's reading off the list; the defendants had the opportunity to discuss their misgivings with counsel during or immediately following the impaneling process; and no objection was made at the time to the defendants' absence from the informal peremptory strike conference. For the same reasons, we conclude that the defendants were sufficiently present at the impaneling of the jury to satisfy the sixth amendment and Rule 43 of the Federal Rules of Criminal Procedure.

2. Sufficiency of the voir dire inquiry

The appellants' second attack upon the jury selection procedures employed in this case is directed at what they perceive to be an impermissibly brief and superficial voir dire examination conducted by the trial court. At the pretrial conference, the district judge informed counsel that he intended to conduct the voir dire himself, that counsel could submit questions they wanted asked, and that the court in turn would determine which questions were appropriate. (v. 29 at 16-17). Waldrop and Fernandez subsequently submitted lists containing 71 and 58 questions, respectively. (v. 9 at 2109-2112; 2173-2176). At the voir dire, the court posed twelve questions to the jurors, most if not all of which were among those requested by the defendants.[12] The appellants

[12]It should be added that a number of the proposed questions seeking general background information respecting the individual jurors were answered by means of questionnaires filled out and returned by the venire.

contend that the limited number of questions asked by the court precluded the defendants from rationally exercising their jury strikes, both peremptory and for cause.

Rule 24(a) of the Federal Rules of Criminal Procedure provides that:

> The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or it may itself conduct the examination. In the latter event, the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

[19] In granting the district court latitude to ask or have asked such questions "as it deems proper," Rule 24 vests considerable discretion in the court to determine the appropriate method and scope of voir dire. *United States v. Brunty*, 701 F.2d 1375, 1378 (11th Cir.1983). That discretion, however, is not boundless.

> We do not deem "as it deems proper" to give a trial judge unlimited discretion to ignore proposed questions nor to permit arbitrary refusal to put such questions.
>
> We do not consider the court's obligation to let counsel, on request, get at underlying bases reflecting on bias, prejudice or other suspect factors to be discharged by general questions such as, "Is there

any reason you cannot fairly and impartially try this case?" This obligation particularly would not seem to be discharged by general direct confrontation questions on human characteristics that most people are reluctant to admit they possess.

On the other hand, we do not mean to suggest that the same matter may be explored in numerous substantially similar questions, with tedious repetitions, of only slightly variant shadings of meaning. No hard and fast rules can be laid down, but the trial court within the general guidelines hereinbefore set forth must exercise its discretion so as not to block the reasonable exploration of germane factors that might expose a basis for challenge, whether for cause or peremptory.

United States v. Levin, 467 F.2d 1132, 1138 (7th Cir.1972); *see also United States v. Nell*, 526 F.2d 1223. 1229-30 (5th Cir.1976). *Accord United States v. Ledee*, 549 F.2d 990, 993 (5th Cir.1977) ("Peremptory strikes are worthless if counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes").

[20] The appellants charge that the defendants were rendered unable to exercise rationally their jury strikes, because of the trial court's failure to pursue two crucial avenues of inquiry: juror bias toward marijuana, and juror prejudgment due to the enormous quantity of marijuana involved in this case. Contrary to the appellants' suggestion, the district court did inquire into juror bias toward marijuana, as follows:

THE COURT: All right. Now, as I have previously indicated to you, this case involves the

alleged importation of marijuana. Marijuana and drug laws in this day and age are somewhat of a controversy. There are those individuals who think that the drug laws are too strictly enforced. There are also those individuals who think the drug laws are not strictly enough enforced.

Now, without asking whether you have any opinions concerning the drug laws, are there any of you that feel that, whatever your opinions may be, that it would influence your conduct in acting as a fair and impartial jury just because this is a drug case? Does everybody understand what I mean?

Are there any of you that feel so strongly about the drug laws that you do not feel that you could base your verdict solely on the evidence, the argument of counsel, and the charge that I will give at the conclusion as to the law that you must follow?

(v. 30 at 54-55).

In response to that question, one juror indicated that he "was going to try" to base his verdict solely on the evidence, but that it would be "a hard decision," because he disliked drugs "mighty hard." (v. 30 at 55-56). While no challenge for cause followed, the juror was subsequently removed by means of a peremptory strike. (v. 30 at 68). We are satisfied that the trial court's inquiry into the juror's bias toward marijuana offenses was sufficient to create "a reasonable assurance that prejudice would be discovered if present." *United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976).

[21] Appellants further challenge the sufficiency of the voir dire because of the trial court's failure to inquire into potential juror prejudice against the defendants in light of the large quantity of marijuana involved. As noted earlier, during the pretrial conference the defendants were invited to submit questions for the court to ask prospective jurors; a total of 129 questions were later submitted. Not one of those proposed questions asked whether the jurors would be affected by the quantity of drugs involved in the case. We are satisfied that the general inquiry into the jurors' opinions respecting drug offenses was sufficient to disclose relevant prejudices, and that it was well within the trial court's discretion not to pursue the matter further with additional questions concerning the jurors' attitudes toward the quantity of marijuana at issue—especially in light of the fact that the defendants never requested that such a question be posed. *United States v. Eastwood*, 489 F.2d 818, 819-20 (5th Cir.1973) (general questions posed by the district court pertaining to juror bias sufficed for specific questions proposed by defendant but rejected by the court); *United States v. Desmarais*, 531 F.2d 632, 634 n. 4 (1st Cir.1976) (failure of defendant to request that specific questions be asked was relevant to a determination that the trial court did not abuse its discretion in failing to ask such questions).

3. The voir dire and defendant's presumption of innocence

[22] As a final attack on the impaneling process, appellants challenge the trial court's inquiries and admonitions concerning the purpose and effect of a grand jury indictment, as impermissibly stripping the defendants of their presumption of innocence, by

suggesting that the indictment constituted a probable cause determination of guilt. Contrary to the appellants' claims, when the two questions and comments complained of are placed in context, the trial court's discourse with veniremembers served to protect rather than to threaten the defendants' presumption of innocence.

In both instances, the remarks at issue were preceded by a question from the court inquiring into whether any of the veniremembers had previously served on a jury. Answers were given indicating that certain individuals had served on grand juries, which prompted the court to respond with a follow-up question:

> Has anybody else had any either grand jury or petty jury experience?
>
> All right. Which leads me to the statement that I make now. Do any of you realize that, of course, the indictment in this case is not evidence of guilt and it only represents a finding that there is probable cause to believe that an offense has been committed by someone(?) Do each of you understand that?
>
> All right. Do each of you understand that in our system the accused stands now before you innocent and remains so until proven guilty beyond a reasonable doubt? Do each of you understand that?
>
> All right. Do each of you understand that the accused need not offer any evidence, need not testify, need not say a thing and that it is on the government to prove their guilt beyond a reasonable doubt? Do

each of you understand that? Do each of you agree with that principal (sic)?

(v. 30 at 52-53). And again:

> THE COURT: You were on a grand jury then. Do each of you understand the difference between a grand jury and a petit jury? Do each of you understand that a grand jury makes a finding of probable cause whereas a petit jury must be convinced by the evidence beyond a reasonable doubt before a conviction can be held(?)

(v. 30 at 70-71). Having evaluated the court's remarks in the context in which they arose, it is clear that the defendants' presumption of innocence and the government's burden of proof were left fully intact. *See United States v. Faulkner*, 488 F.2d 328, 330-31 (5th Cir.1974).

III. Issues Relating to Matters Arising at Trial

A. Closing Argument

The appellants challenge the italicized portions of the following excerpt from the government's closing argument, as improperly calculated to incite the passions of the jury and prejudicial to the defendants' right to a fair trial:

> By your verdict today, by your verdict today or tomorrow, whenever you render that verdict, you will be serving the cause of justice. I am going to tell you, too, whatever the outcome is in this case, justice will have been served. I want to see justice

done. I don't want to see convictions for the sake of convictions. I want to see that justice is done.

You go in there, follow the instructions of the law, apply it to the evidence in the case. Then justice will have been done. Justice will have been served.

But you serve by your verdict, you serve as a conscience of this community. If you find that the government, by its evidence, has proved these defendants guilty beyond and to the exclusion of a reasonable doubt, then it's your duty to find these defendants guilty as charged. By that verdict, you will send out a very loud and clear message to other people of a similar persuasion that will traffic—

MR. HARTMAN: Judge, I object.

THE COURT: Overruled.

MR. GREEKER: *—That would traffic in marijuana of these quantities,* that would engage in this kind of illegal activities. *You have heard and you're familiar by virtue of your own common sense and experience with everyday affairs, the term, the war on drugs.*

Isn't this case really one about a war? Haven't they invaded our shores?

MR. HARTMAN: Objection.

MR. KRIEGER: Objection.

THE COURT: Well, the argument of counsel is in response to the defense lawyers' argument. The jury knows that the argument of counsel is not evidence. To that extent, they will disregard it.

MR. GREEKER: In any event, *there are tons and tons of marijuana brought into our communities here and dumped on our community.* This arena of justice, this court of law, is the place to decide whether or not this kind of activity is going to continue. Consider the evidence.

MR. DIAMOND: Continuing objection—

THE COURT: Overruled.

MR. DIAMOND: Continuing objection to that line of questioning.

THE COURT: Overruled.

MR. GREEKER: Consider your verdict based on the evidence, not what I argue. My argument is not evidence. But consider the evidence. If you consider the evidence and weigh it properly, then I am confident you will return a just verdict. Thank you.

(v. 43 at 293-95).

[23-25] In order for a claim of prosecutiorial misconduct during closing argument to warrant reversal, the challenged remarks must be 1) improper; and 2) prejudicial to a substantial right of the defendant. *United States v. Kopituk*, 690 F.2d 1289, 1341 (11th Cir.1982).

Upon evaluating the prosecutor's closing argument in light of the foregoing criteria, we hold that the challenged statements do not constitute reversible misconduct.

The statements of the United States Attorney that are complained of in this appeal, were made in rebuttal, following the closing arguments of the defendants. Among the closing arguments, and occupying thirty pages of transcript, was a self-described "drama" performed by counsel for James and beginning as follows:

> This is a criminal trial. This is a big case for the government. That's what it was, folks. I didn't lie. It was a circus right from the beginning to the bitter end.
>
> So allow me to indulge a bit in a little drama and tell you about Operation Sunburn.
>
> Ladies and gentlemen, welcome to the Big Top, the Greatest Show on Earth, also known as Operation Sunburn. Accompany me. The drama is in three sections. Starring Mr. Nickolas Geeker, United States Attorney, as Mr. Nick the Ringmaster. Mike Moore as Mr. Mike, the Animal Trainer, and Assistant Ringmaster, Mr. Ken Sukhia, as the Young Circus Boy in Training. The Friendly Mr. Ferdinand Bockelman, the Paper Man Putting Posters Out to Welcome People to the Circus. And Scott Daniels, Assistant Animal Trainer and Keeper of the Zoo.
>
> Act One. The circus comes to town. Well, Mr. Nick, we certainly have a good circus coming here. We've got a good show, got a lots of animals lined up for Mr. Mike. I got some great people some—

rather, we've got them lined up. We are going to get that man on the highwire.

Who is that, says the Young Circus Boy. Who is that man walking on the high wire up there?

Well, this is Manny James.

Defense counsel's extended analogy of the government's conduct to a three-ring circus "was clearly an invitation to the prosecutor to protest to the contrary." *United States v. Eley*, 723 F.2d 1522, 1526 (11th Cir.1984). When the prosecutor goes no further than to take defense counsel up on his invitation, his conduct will not be regarded as impermissibly calculated to incite the passions of the jury. *Id.; see also United States v. Cotton*, 631 F.2d 63, 63-66 (5th Cir.1980). The United States Attorney's likening the drug problem to a war or enemy invasion, coupled with his statement that he was interested in justice and not convictions for their own sake, could fairly be described as little more than a response to defense counsel's suggestion that the defendants' prosecution was a show put on by government counsel for their own amusement.

[26-28] Turning to the specific remarks complained of, prosecutorial appeals for the jury to act as "the conscience of the community" are not impermissible, unless calculated to inflame. *United States v. Kopituk*, F.2d 1289, 1292-93; *United States v. Lewis*, 547 F.2d 1030, 1036 (8th Cir.1976); *United States v. Alloway*, 397 F.2d 105, 113 (6th Cir.1968). Nor is it impermissible "to simply compare the duties of citizens serving on juries with those of citizens serving in the armed forces." *Brooks v. Francis*, 716 F.2d 780, 789 (11th Cir.1983) (en

banc pending). Finally, the prosecutor's reference to "tons and tons" of marijuana being "dumped" on the community was nothing more than a permissibly colorful way to describe a fact amply borne out in the record.

Because the remarks of government counsel are better understood as a response to the defendant's closing argument than as an attempt to inflame the jury, and because those remarks were not improper in and of themselves, reversal is unwarranted.

B. Ex Parte Communications Between the Judge and Jury During Deliberations

The jury commenced its deliberations at 9:50 a.m. on March 25. In the course of the day, the judge and jury exchanged several notes: (1) the jury requested an index of tapes played at trial, to which the court responded that no acceptable index existed; (2) the jury inquired as to a number of pages missing from the indictment, to which the court responded that the missing pages involved matters not relevant for the jury's consideration; (3) the jury requested transcripts of telephone conversations introduced into evidence by the prosecution and defense, to which the court responded that the jury already had transcripts of all telephone conversations introduced by the government, that some but not all of the telephone conversations introduced by the defense had been transcribed, and that to the extent the jury could not recall what it heard in the tapes that were not transcribed, it could request that any particular tape be replayed in open court; (4) the jury indicated that the tape transcripts were not in the jury room, to which the court did not respond. (v. 15 at 3455-62). The

court went back on the record at 6:00 p.m., and in the presence of counsel stated:

> I think we'll start tomorrow morning afresh, assuming they're not finished. I am confident they're not. But what I thought I would do is just send a note to them and ask them if they have arrived at any complete verdicts as to any defendants. Then find out yes or no. And then tell the marshal to bring them into the courtroom and bring with them only those verdicts, if any that they have arrived at as to any of the defendants. Is that fair enough?

(v. 44 at 68). Notwithstanding the concern of a number of defendants that such a note might be interpreted as coercive, the court sent the following message to the jury room: "Have you arrived at a unanimous verdict as to any defendant which you wish to report to me? Yes or no," to which the jury responded, "No, sir." The record reflects that the jury was returned to the courtroom at 6:11 p.m., at which time the court stated:

> Members of the jury, I passed the note to you asking you whether you had reached a unanimous verdict as to any defendant, for the sole purpose of trying to give me some idea of how you were coming in your deliberations. I don't suggest that you should have reached a unanimous verdict as to any defendant. It occurs to me you have been here now over ten hours and you have had to digest a lot of things. And it further occurs to me that you probably won't be able to reach a verdict tonight as to any or all of the defendants. And consequently, I am going to discharge you to the

> custody of the marshals for the remainder of the evening.

(v. 44 at 71-72).

After the jury had been excused, the court stated as follows:

> While we are on the record and the jury is gone, have all counsel seen the notes that the jury has, the questions they have asked and the answers given? . . . I didn't see any need in calling counsel on the questions that were asked. The main problem was, they couldn't find a piece—or some evidence. And the transcripts of the tapes.

(v. 44 at 72-73). Counsel for appellant James indicated affirmatively on the record that he had read the notes, and it can be assumed by the silence of the remaining counsel, who were present, that they had likewise read the notes. No objections were made at that time.

On March 26, two notes were sent from the jury to the court: one indicating that a verdict had been reached as to four of the six defendants, and the second stating that the jury was hung with respect to one defendant. At 4:45 that afternoon, the court went on the record to say that it had received the note indicating that the jury was hung, and proposed that an *Allen* charge, the so-called "dynamite charge," be given. Over objection, the jury was returned to the courtroom at 4:51, and the *Allen* charge was read. The verdict was returned approximately an hour after the jury had been returned to the jury room and recommenced deliberations.

[29] With respect to the court's inquiry into whether the jury had reached a partial verdict as of the evening of the 25th, we find that no error was committed. The record clearly indicates that the communication was not undertaken until after counsel had been notified and had been given the opportunity to object. *United States v. McDuffie*, 542 F.2d 236, 241 (5th Cir.1976). Moreover, any coercive or otherwise improper impact the note might conceivably have had, was neutralized by the court's later remarks when the jury was returned to the courtroom.

[30] The other communications undertaken on the 25th are somewhat more troubling. It is certainly true that preferable procedure would have been for the court to have informed counsel of communications from the jury and to afford them an opportunity to be heard before written responses were returned. *United States v. McDuffie*, 542 F.2d 236, 241 (5th Cir.1976). Nevertheless, counsel's failure to object to the ex parte communications at the time they were revealed may have operated as a waiver. Moreover, courts have universally held that where wholly innocuous inquiries of the sort at issue here are responded to by the court without first consulting counsel, any error thereby committed is non-prejudicial. *United States v. Reynolds*, 489 F.2d 4, 7-8 (6th Cir.1973); *United States v. Stone*, 452 F.2d 42, 48-49 (8th Cir.1971); *United States v. Goodman*, 457 F.2d 68, 72-73 (9th Cir.1972); *United States v. Freed*, 460 F.2d 75, 78-79 (10th Cir.1972). As the Fifth Circuit noted in *United States v. Breedlove*, 576 F.2d 57, 60 (5th Cir.1978), "when the judge's answer to the jury's inquiry was distinctly responsive to the question, it clearly stated the law, and no prejudice is shown, the error is harmless." *See also United States v. McDuffie*, 542 F.2d 236, 241 (5th Cir.1976). In this

case, the court's answers were distinctly responsive to the jury's questions, and as such were at most harmless error.[13]

Separate Issues

I. Villanueva and Fernandez

A. The interview of Fernandez by a United States Attorney outside the presence of Fernandez's counsel.

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[13]Counsel for Villanueva and Fernandez make reference to a note submitted by the jury to the court on the 26th stating: "We would like to go home and come back tomorrow." (v. 15 at 3467). In their brief, Villanueva and Fernandez assert that this note was submitted to the court without the knowledge of defense counsel before the *Allen* charge had been given and before a verdict had been reached. They argue that the effect of the *Allen* charge urging the jury to attempt to resolve their differences and reach a verdict, when the jury had expressed a desire to go home, was impermissibly coercive, but that because counsel were unaware of the jury communication, no objection was possible.

This argument is premised upon a blatant misreading of the record. The jury returned its verdict at 6:10 p.m. on March 26. (v. 44 at 80-88). At that point, the court informed the jury that it still had to decide whether certain pieces of defendants' property were to be forfeited to the government. On the record and in open court, the judge gave the jury the option of continuing on into the evening or returning in the morning, and the jury responded by way of a note, that again was read in open court and on the record, saying that they would prefer to recess and return in the morning. (v. 44 at 88-89). Since the communication appellants complain of occurred with their knowledge, after the *Allen* charge had been read and the verdicts announced, and without objection, the appellants' argument is patently frivolous.

[31] Prior to trial, with the knowledge and assent of Fernandez's attorney, a United States Attorney offered not to oppose Fernandez's motion to reduce bond, in return for the opportunity to speak with Fernandez privately, outside the presence of his counsel. Fernandez agreed. The government's objective was to investigate what was suspected to be the improper representation of Fernandez and James by their principal attorney, a suspicion subsequently confirmed, resulting in disqualification of the lawyer involved.

On the basis of this incident, Fernandez moved the district court to dismiss the indictment. The district court ruled that the communication was improper, but could be remedied by means less extreme than dismissal:

> Assuming the United States Attorney's behavior amounted to misconduct, the "remedies should be tailored to the injury suffered . . . ." *United States v. Morrison*, [449 U.S. 361, 364, 101 S.Ct. 665, 668], 66 L.Ed.2d 564, 568 (1981). . . . Fernandez complain(s) of two injuries. One is that the United States Attorney's actions poisoned their relationship with their lawyer. That complaint is mooted by their lawyer's disqualification. The other is that through his conversations with them the United States Attorney gained evidence and leads to even more evidence. The United States Attorney quite properly states he does not intend to introduce in his case in chief any evidence given him in the meetings and that the conversations were not used to obtain evidence. Even if, as defendants allege, evidence were procured through the conversations, the prejudice can be cured by suppression of the evidence.

On appeal, Fernandez acknowledges that the Supreme Court's unanimous decision in *United States v. Morrison* explicitly held that absent demonstrable prejudice, dismissal of an indictment for violation of a defendant's sixth amendment rights is unnecessary. 101 S.Ct. 665, 449 U.S. 361, 66 L.Ed.2d 564 (1981). Inexplicably, however, Fernandez does not challenge the district court's conclusion that the potential for prejudice could be eliminated by means stopping short of dismissal, but instead is content to argue that the government's conduct requires per se dismissal. In effect, the appellant invites us to overrule Supreme Court precedent. We decline.

The agreement negotiated by the United States Attorney, wherein Fernandez was to barter his right to counsel in return for his freedom, constituted a coerced rather than voluntary waiver of the appellant's sixth amendment rights, and as such was wholly improper. *See Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). Nevertheless, we are in complete agreement with the district court that suppression of information obtained from Fernandez in defense counsel's absence assured that the government's misconduct would not prejudice the appellant in any way. Fernandez is unable to point to any evidence admitted at trial that was secured as a result of the improper interview. Accordingly, we affirm its ruling.

B. The sufficiency of the evidence supporting Villanueva's continuing criminal enterprise conviction.

[32] Under 21 U.S.C. § 848, a person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment of ten years to life. A person

is considered to have engaged in a continuing criminal enterprise if he violates any provision of 21 U.S.C. §§ 801 *et seq.* governing drug abuse prevention and control, in the course of a continuing series of like violations undertaken in concert with five or more other persons "with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management," as a result of which that person obtains substantial income or resources. Villanueva challenges his conviction under this statute, on the grounds that the evidence was insufficient to demonstrate that he was an organizer or supervisor of the enterprise. Viewing the record in the light most favorable to the government, we conclude that the evidence was sufficient to support Villanueva's conviction.

Evidence supporting Villanueva's continuing criminal enterprise conviction came largely from the testimony of two of Villanueva's former co-conspirators: Bill Cobb and Dan Abbey. Cobb testified that from the time of his first involvement in the conspiracy, Acosta, Bascaro, and Villaneuva were the ones principally responsible for bringing marijuana into the United States. Cobb testified that Villanueva was involved in overseeing the purchase of suitable vessels, was present at storage sites when marijuana arrived, and participated in planning meetings. Cobb further testified that Villanueva furnished the money to purchase the properties where marijuana was stashed (v. 38 at 152-63); Villanueva together with Acosta were responsible for approving the sites where marijuana was to be offloaded (v. 38 at 183); and the enterprise deferred to Villanueva's judgment as to when the offloading was to occur (v. 38 at 195).

Abbey testified that the standard operating procedure of the enterprise was for him to collect the proceeds from various drug sales and turn them over to Villanueva and Acosta. (v. 40 at 15-17; 48-49; 57). Abbey further indicated that Villanueva was one of several members of the organization who would prepare the weight sheets, records reflecting the quantity of marijuana transferred to particular buyers. Weight sheets were reproduced in triplicate, and upon completion of a sale, one copy would go to the buyer, another would be retained by Abbey, and a third would be returned to either Acosta or Villanueva. (v. 40 at 42-44). At the conclusion of his direct examination, Abbey was asked to describe the various roles of the individuals about whom he had testified. He responded, without objection from defense counsel, that Villanueva "was in charge of the complete operation initially." (v. 40 at 65-66).

The foregoing testimony furnishes an adequate basis for the conclusion that Villanueva occupied a supervisory role in the conspiracy. Certainly the most conclusive evidence of this fact is Abbey's testimony that Villanueva was "in charge of the complete operation" and again that he was "the top man." (v. 40 at 65-94). Such conclusions were amply supported by Abbey's previous testimony concerning Villanueva's financial control of the enterprise. *United States v. Johnson*, 575 F.2d 1347 (5th Cir.1978).

C. Double jeopardy and Villanueva's convictions for both continuing criminal enterprise and underlying conspiracy counts.

[33] In affirming Villanueva's continuing criminal enterprise conviction, we must simultaneously vacate his convictions on counts three and five for conspiracy to import and conspiracy to possess with intent to distribute marijuana, on double jeopardy grounds. The conspiracy provisions of the Controlled Substances and Controlled Substances Import and Export Acts proscribe conspiracy to commit any of the offenses defined in those acts. 21 U.S.C. §§ 846; 963. Similarly, the crime of continuing criminal enterprise, as defined in the Controlled Substances Act and construed by the Supreme Court in *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977), includes as one of its elements a conspiracy to violate the provisions of the Controlled Substances or Controlled Substances Import and Export Acts. 21 U.S.C. § 848(b). In other words, one cannot be guilty of continuing criminal enterprise without also being guilty of conspiracy—the latter is a lesser included offense of the former. *Jeffers; United States v. Michel*, 588 F.2d 986, 1001 (5th Cir.1979); *United States v. Graziano*, 710 F.2d 691, 699 (11th Cir.1983). Where, as here, a defendant is convicted of engaging in a continuing criminal enterprise as well as the lesser included offenses of conspiracy to import and conspiracy to possess with intent to distribute marijuana, the proper remedy is to vacate both the convictions and sentences of the lesser included conspiracy offenses. *Graziano*, 710 F2.d at 699.

II. Hobson and Waldrop

Appellants Hobson and Waldrop argue that the evidence was insufficient to sutain any of their several convictions. Both Hobson and Waldrop were convicted

of conspiracy and substantive offenses under the RICO statute, conspiracy to import and conspiracy to possess with intent to distribute a controlled substance, and possessing with intent to distribute and importing a controlled substance.

Hobson and Waldrop might best be described as preferred customers of the enterprise. They were marijuana buyers (v. 40 at 66), Waldrop was described as one of the organization's "best buyers" (v. 40 at 55), and it was estimated that the two of them had purchased marijuana from the organization on 25 or 30 occasions (v. 40 at 62). The closeness of the working relationship between Hobson, Waldrop, and the other members of the enterprise is evidenced by numerous instances of mutual accommodation. Waldrop was relieved of his obligation to pay for 750 pounds of marijuana that Waldrop claimed was bad (v. 40 at 25), Waldrop and Hobson advanced money to the other members of the enterprise as a deposit on an incoming marijuana shipment (v. 38 at 187, 220-22), and at Hobson's instigation, a second attempt was made to import marijuana by plane following the failure of an initial attempt (v. 38 at 222-23).

Hobson and Waldrop's convictions arose out of their involvement in two smuggling ventures: the "Tallahassee warehouse" and "Constellation" episodes. The Tallahassee warehouse episode involved Waldrop but not Hobson. In April 1978, a warehouse in Tallahassee, Florida was leased in anticipation of the arrival of a double load, or 80,000 pounds, of marijuana. The load arrived in late April, of which 40,000 pounds was set aside for Waldrop; for reasons that were never explained, however, Waldrop was late in picking the load up. (v. 40

at 52-53). On April 26, the Florida Department of Law Enforcement discovered the stash, and were at the warehouse conducting an investigation when Waldrop arrived in a rented car. (v. 31 at 85-90). Waldrop was stopped and questioned, and a consensual search of his briefcase yielded records of marijuana transactions. The records were seized, but Waldrop was released at that time. (v. 31 at 89-90).

The Constellation episode involved both Hobson and Waldrop. In January 1979, Cobb, together with Waldrop and Hobson, made arrangements for the delivery of a planeload of marijuana. (v. 38 at 186-87). Appellant James advised Cobb against embarking upon this particular venture, but agreed to stand by and provide Cobb with legal assistance if necessary. (v. 38 at 187-88). Waldrop made a down payment of $1,500,000 with the expectation that he and Hobson would receive the entire planeload of marijuana (v. 34 at 165; v. 38 at 167; v. 40 at 55). The plan failed, however, when the plane was seized upon its arrival at the Ft. Lauderdale airport. Appellant James was called in to represent the parties arrested (v. 38 at 188), and Acosta interposed himself between Cobb and the Colombian sellers, who were blaming Cobb for the venture's failure (v. 39 at 118-19).

Waldrop and Hobson requested that Cobb either attempt a second airplane smuggling venture, or return their security deposit; Cobb agreed to a second attempt on the condition that Waldrop and Hobson purchase most if not all of the shipment. (v. 38 at 221-23). In February 1979, a Constellation aircraft was flown to Colombia, and loaded with marijuana. Because of fog and engine problems, the craft was compelled to land

in Panama City in lieu of the more clandestine site agreed upon, and federal agents were ready and waiting upon its arrival. (v. 32 at 132-40; 161-66).

A. Conspiracy to Import and Conspiracy to Possess with Intent to Distribute

Hobson and Waldrop insist that the record is devoid of evidence that they entered into a conspiratorial agreement with the other co-defendants; at best, they contend, the evidence indicates that they were merely buyers from and not members of the conspiracy.

[34-36] In order for a defendant to be found guilty of conspiracy, the government must demonstrate that a conspiracy existed, that the defendant had knowledge of it, and that he or she voluntarily became a part of it. *United States v. Badolato*, 701 F.2d 915, 920 (11th Cir.1983); *United States v. Lippner*, 676 F.2d 456, 466 (11th Cir.1982). The existence of a conspiracy may be demonstrated by circumstantial evidence such as inferences from the conduct of the defendant or circumstances indicating a scheme or plan. The knowledge requirement refers simply to knowledge of the essential objective of the conspiracy; a defendant may be found guilty notwithstanding that he did not have knowledge of all the details of the conspiracy or played only a minor role in the total operation, *Badolato*, 701 F.2d at 918-20; *United States v. Corbin*, 734 F.2d 643 (11th Cir.1984).

[37] It is settled that the existence of a simple buyer-seller relationship alone does not furnish the requisite evidence of a conspiratorial agreement. *United States v. Braico*, 422 F.2d 543 (7th Cir.1970); *United States v. Watson*, 594 F.2d 1330, 1337 (10th Cir.1979)

United States v. Torres, 503 F.2d 1120, 1123 (2d Cir.1974). It is equally well settled, however, that where a buyer knowingly assumes a role instrumental to the success of the conspiracy, the jury may properly infer that he is a member in it. *United States v. Apollo*, 476 F.2d 156, 162 (5th Cir.1973) (finding it unnecessary "to define precisely how limited purchases, in number or size, may be in such 'mere purchases' cases and still permit the intent to participate in an unlawful conspiracy to be inferred," because "in the present case, there was direct proof of a continuing relationship between Apollo and Cocroft, a known conspirator, which resulted on at least two occasions in the witting transfer of company marijuana to Apollo"); *United States v. Hess*, 691 F.2d 984, 988 (11th Cir.1982) (while a fence does not automatically become a conspirator by purchasing stolen property, fences are necessary to the success of a hijacking conspiracy, and a fence who holds himself out as a place to dispose of stolen goods is a conspirator).

[38] In this case, it is clear that Hobson and Waldrop were more than "mere purchasers." They were among the selling group's best buyers, they purchased from the selling group on numerous occasions, and maintained a close relationship with the selling group. The success of the selling group's endeavors depended upon the participation and cooperation of Hobson and Waldrop: Waldrop's failure to pick up the marijuana from the Tallahassee warehouse as scheduled resulted in a delay that led to seizure of the shipment, and the success of the Constellation episode depended upon Hobson's and Waldrop's willingness to purchase a majority if not all of the marijuana load. Accordingly, we find the evidence more than sufficient to sustain the conclusion that Hobson

and Waldrop had entered into a conspiratorial agreement with the other co-defendants.

Hobson and Waldrop further argue that regardless of whether their role as frequent buyers is sufficient to demonstrate their complicity in a conspiracy to possess marijuana, the evidence remained insufficient to support the inference that they had knowledge that the marijuana was imported. Accordingly, they contend that their convictions for conspiracy to import cannot stand, because they had no knowledge of an essential objective of the conspiracy.

[39, 40] In order to be guilty of conspiring to import a controlled substance, in violation of 21 U.S.C. § 963, the defendant must have known that the substance was imported. *United States v. Steward*, 451 F.2d 1203 (2d Cir.1971); *Mason v. United States*, 383 F.2d 107 (10th Cir.1967). A defendant will not be held to have knowledge of an illegal importation solely on the basis of evidence that one or more of his alleged co-conspirators had such knowledge; nevertheless, direct or circumstantial evidence may justify an inference of knowledge. *Mason v. United States*, 383 F.2d 107 (10th Cir.1967).

[41] Here, there is no question that marijuana was imported from Colombia, South America into the United States by means of boat and airplane. There is likewise no question that Hobson and Waldrop's co-defendants were aware that the marijuana was imported. In light of the massive quantity of marijuana involved, the frequency with which Waldrop and Hobson had occasion to deal with the other members of the

enterprise, the fact that Hobson, Waldrop and Cobb were described as the principal organizers of the Constellation episode in which marijuana was to be delivered by airplane from Colombia to southern Florida, and the presence of both Hobson and Waldrop at various of the organization's stash houses on numerous occasions, the jury was warranted in finding that Hobson and Waldrop knew the marijuana was imported. *United States v. Corbin*, 734 F.2d 643 (11th Cir.1984); *United States v. Garcia*, 721 F.2d 721, 725 (11th Cir.1983).

B. The RICO Offenses

Subsection (c) of 18 U.S.C. § 1962 makes it unlawful to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity. Subsection (d), in turn, makes it unlawful to conspire to violate the provisions of subsection (c).

Hobson was convicted of a substantive RICO violation pursuant to subsection (c), as well as a RICO conspiracy under subsection (d). The basis for Hobson's RICO convictions arose from his involvement in the Constellation episode in connection with which he was indicted and convicted of importation and possession with intent to distribute marijuana.[14] Hobson argues that these two convictions were the result of a single attempt on his part to procure marijuana, and that consequently he

[14]It may be recalled that Hobson was also convicted of conspiracy to possess and conspiracy to import, which would qualify as additional acts of racketeering under the Act; the indictment, however, limited the predicate acts alleged against Hobson under the RICO charges to the two substantive offenses.

was not shown to have engaged or conspired to engage in a "pattern" of racketeering activity.

[42] "Pattern of racketeering activity" is defined in 18 U.S.C. § 1961(5) as "at least two acts of racketeering activity" committed within a ten-year period. "Racketeering activity" is defined to include "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or *dealing in narcotic or other dangerous drugs*, which is chargeable under state law and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1) (emphasis supplied). The statutory definition of pattern of racketeering activity has been construed as follows:

> To be convicted of a § 1962(c) RICO charge, the evidence must show that the defendant participated in the affairs of the enterprise through a pattern of racketeering activity. This requires the commission of at least *two predicate crimes.*

United States v. Welch, 656 F.2d 1039, 1057 (5th Cir.1981) (emphasis supplied). Possessing and importing marijuana are two separate acts for purposes of the RICO statute. The appellants' suggestion that two predicate acts cannot have arisen out of a single transaction was expressly considered and rejected in *United States v. Phillips*, 664 F.2d 971, 1039 (5th Cir. Unit B 1981).

Waldrop's convictions under the RICO statute stem from his involvement in both the Tallahassee warehouse and Constellation episodes. The predicate acts of racketeering activity underlying the RICO counts included: possession of marijuana with intent to distribute, in connection with the Tallahassee warehouse venture;

and importation and possession of marijuana with intent to distribute in connection with the Constellation venture.[15]

It is Waldrop's position that the Constellation venture was independently undertaken by Cobb, Hobson and Waldrop and was not an affair of the enterprise. If the predicate acts alleged in connection with Constellation venture are stripped from indictment on the ground that they were unrelated to the enterprise's affairs, only one predicate act remains—the possession of marijuana stored at the Tallahassee warehouse—which alone does not constitute a "pattern" of racketeering activity. In support of his position, Waldrop makes two related arguments. First, Waldrop assigns error to the district court's refusal to read Waldrop's requested instructions concerning the definition of the enterprise, and Waldrop's theory of defense. Second, Waldrop argues that the evidence does not support the conclusion that the Constellation venture was an affair of the enterprise.

At trial, Waldrop requested that the following instruction be read respecting the definiton of the RICO enterprise in this case:

> In order to find defendant, Patrick M. Waldrop, guilty of Count 2, you must find that the government has proven, beyond a reasonable doubt that, the enterprise established by Manuel Eric Villanueva, Jose Luis Acosta and Antonio E. Bascaro, as previously described, existed in fact, and that Mr. Waldrop knowingly and willfully participated in

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[15]Like Hobson, Waldrop was also convicted on conspiracy charges, but again the indictment did not list those charges as predicate acts in the RICO count.

the conduct of this particular enterprise's affairs through a pattern of racketeering activity. In order to conclude that Mr. Waldrop participated through a pattern of racketeering activity, you must find that he committed at least two of the following acts and that they were in furtherance of the conduct of this particular conspiracy: (the three previously mentioned affirmative acts are then recited).

The district court rejected Waldrop's proposed instruction in favor of the following:

> Count 2 of the indictment alleges that from on or about January 1977 and continuously afterwards up to and including September 3, 1981, defendants Manuel Eric Villanueva, Antonio E. Bascaro, Manuel W. James, Gustavo J. Fernandez, Patrick C. Waldrop, and Russell Hobson were persons associated with an enterprise or an enterprise as defined by Title 18, United States Code, § 1961(4), that the enterprise engaged in or its activities affected interstate commerce and that the defendants knowingly and willfully participated in the enterprise's affairs through a pattern of racketeering endeavor in violation of Title 18, United States Code, § 1962(c). . . . Count 2 alleges that the enterprise consisted of a group of individuals associated in fact for the purpose of importing multi-ton quantities of marijuana into the United States from a place outside of the United States, possessing multi-ton quantities of marijuana with the intent to distribute and distributing within the United States, multi-ton quantities of marijuana, a Schedule I controlled substance. Now let me define some of the terms of

this statute for you. The term enterprise, as used in the statute, includes any individual, partnership, corporation, association, or other legal entity and any group of individuals associated in fact, although not a legal entity.... In order to establish that any of the defendants named in Count 2 of the indictment committed the offense charged in that count, the government must prove as to that particular defendant each of the following elements beyond a reasonable doubt. First, that the defendant was associated with an enterprise as I have defined it for you. Second, that the defendant engaged in a pattern of racketeering activity as I have defined it for you by knowingly and willfully committing, or knowingly and willfully aiding and abetting at least two acts of racketeering activity as hereinafter explained. That at least two acts of racketeering activity occurred within ten years of each other, that one of such offenses took place after October the 10th, 1970, *that the offenses were connected with each other by some common scheme, plan or motive so as to constitute a pattern, and not merely a series of disconnected acts.* Fourth, that the commission of two or more connected offenses the defendants conducted or participated in the conduct of the enterprise. Fifth, that the enterprise engaged in or that its activities affected interstate or foreign commerce.

Waldrop argues that in defining the enterprise as a group associated in fact for the purpose of importing and possessing marijuana, the instruction delivered would lead the jury to find any marijuana smuggling venture undertaken by one or more of the defendants would necessarily be a venture of the enterprise. Put

another way, Waldrop contends that the enterprise was defined for the jury solely in terms of the racketeering activity it allegedly conducted, so that any conduct qualifying as an act of racketeering under the Act would be ascribed to the enterprise, regardless of whether independently undertaken, as Waldrop contends was the case with the Constellation venture. In Waldrop's view, the instruction he proposed avoided this pitfall by more precisely defining the charged enterprise in terms of its principal organizers.

[43, 44] Waldrop is quite correct that the existence of an enterprise is an element of a RICO violation distinct from the element of a pattern of racketeering activity in which the enterprise engages. *United States v. Phillips*, 664 F.2d 971, 1011 (5th Cir. Unit B 1981); *United States v. Lemm*, 680 F.2d 1193 (8th Cir.1982); *United States v. Anderson*, 626 F.2d 1358 (8th Cir.1980). We do not agree, however, that the instruction delivered would have the effect Waldrop suggests.

The district court described the enterprise in question in terms of a group of individuals defined to include Bascaro, Villanueva, James Fernandez, Waldrop, and Hobson who were associated in fact for the purpose of importing, possessing and distributing marijuana. We do not believe that this instruction could be misunderstood to permit the jury to ascribe to the enterprise smuggling ventures independently undertaken by one or more of its members. The instruction permitted the jury to find that Hobson and Waldrop's activities with respect to the Constellation smuggling venture could be included among the overt acts of racketeering activity needed to establish a "pattern" under the RICO statute, only if

such activity was associated with the affairs of the enterprise, defined in terms of all named defendants and their common purpose. The court's refusal to read Waldrop's proposed instruction, therefore, was not fatal.

Waldrop further argues that even if the court's instruction was proper, it was error not to recite Waldrop's theory of defense. Waldrop's proposed instruction stated as follows:

> Mr. Waldrop's theory of the defense is that he must be acquitted of the charges contained in Count 2 of this indictment, because the government has not proven, beyond a reasonable doubt, the following: (1) that he knowingly or willfully participated, directly or indirectly, in any enterprise established by Manuel Eric Villanueva, Jose Luis Acosta, and Antonio E. Bascaro through a pattern of rackteering activity; (2) that the evidence fails to establish that he committed two acts of racketeering which were connected, directly or indirectly, to the enterprise established by Manuel Eric Villanueva, Jose Luis Acosta, and Antonio E. Bascaro.

[45, 46] A district court's refusal to deliver a defendant's requested instruction will constitute reversible error "if and only if the requested instruction (1) is correct, (2) is not substantially covered by other instructions which were delivered, and (2) deals with some point in the trial so 'vital' that the failure to give the requested instruction seriously impaired the defendant's ability to defend." *United States v. Stone*, 702 F.2d 1333, 1339 (11th Cir.1983). We are satisfied that the requested instruction was substantially covered by other instructions delivered. The only difference

between the "theory of defense" instruction requested and the instruction given was that the instruction given defined the enterprise in terms of its participants and purpose instead of its organizers, which for reasons given above is not a difference so vital as to impair the defendants' ability to defend under the instruction delivered.

[47] We are further satisfied that the evidence supported the jury's finding that the Constellation episode was an affair of the enterprise and not a free-lance smuggling venture. The venture was headed by Cobb, a self-described leader of the enterprise. James was called upon to serve as counsel to the participants, just as he had been with virtually all of the affairs of the enterprise. Finally, Acosta assumed responsibility for the venture by stepping in to rescue Cobb after the venture had failed. Viewing the record in a light most favorable to the government, we hold that the above-mentioned facts could combine to lead a reasonable juror to conclude that the Constellation venture was an affair of the charged enterprise.

C. Importation and Possession of Marijuana with Intent to Distribute

The gist of Hobson and Waldrop's contention with respect to the possession and importation counts is that they never had constructive or actual possession of the marijuana, nor were they physically responsible for the importation. Hobson candidly acknowledges that to the extent he is linked to a conspiracy to possess or import, he may be found guilty of the completed acts of possession and importation notwithstanding that he

did not physically commit them. *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). He points out, however, that before a defendant may be convicted of substantive offenses on the basis of acts committed by his co-conspirators, a jury instruction outlining that basis for liability must be given. *United States v. Monaco*, 702 F.2d 860, 881 (11th Cir.1983). Inexplicably, the government did not request and the district court did not deliver a *Pinkerton*-type instruction. The court did, however, instruct the jury that a defendant would properly be found guilty of a substantive offense were he to aid or abet another in its commission.

[48] Hobson and Waldrop's convictions for possession of marijuana with intent to distribute must be upheld if the evidence is sufficient to sustain the finding that they had either constructive or actual possession, or that they aided and abetted another who had constructive or actual possession. We have little trouble holding that Waldrop had constructive possession over the marijuana seized at the Tallahassee warehouse. "Constructive possession consists of the knowing exercise of the knowing power or right to exercise dominion and control over the substance." *United States v. Knight*, 705 F.2d 432, 433 (11th Cir. 1983). Testimony adduced at trial indicated that 40,000 pounds of the Tallahassee warehouse load was set aside for Waldrop; that Waldrop personally stacked a number of bales and set them aside with the intent to pick them up later; and finally, that he was stopped by law enforcement agents upon his return to the warehouse. Taken together, these facts amply demonstrate that Waldrop exercised dominion and control over the marijuana in question.

[49] With respect to the Constellation venture, the evidence would not appear to support a finding that Hobson or Waldrop exercised either actual or constructive possession over the marijuana on board the aircraft. The mere fact that they had made a deposit of $1,500,000 on the incoming shipment does not satisfy the requirement that they exercised dominion and control over it. The absence of actual or constructive possession, however, does not foreclose the possibility that they were properly convicted under an aider and abettor theory of liability. Hobson is mistaken in his belief that he may not be convicted as an aider and abettor when he was indicted as a principal only: "One who has been indicted as a principal may be convicted on evidence showing only that he aided and abetted the commission of the offense." *United States v. Oquendo*, 505 F.2d 1307, 1310 n. 1 (5th Cir.1975).

In *United States v. Trevino*, 556 F.2d 1265 (5th Cir.1977), the court set out the requirements for aiding and abetting possession of a controlled substance with intent to distribute:

> Trevino and Gonzales were charged in this count under 21 U.S.C. § 841(a)(1) (1976), making illegal any possession of a controlled substance with intent to distribute, and 18 U.S.C. § 2 (1970), providing that "whoever . . . aids, abets, counsels, commands, induces or procures" the commission of a federal crime is punishable as a principal for the violation itself. To aid or abet another in the commission of a crime within the meaning of the statute requires that the defendant "in some sort associate himself with the venture, that he participate in it as

> something that he wishes to bring about, that he seek by his action to make it succeed."

Id. at 1269 (citations omitted). In this case, Cobb indicated that he, Waldrop and Hobson were primarily responsible for the Constellation venture. Waldrop and Hobson advanced money to Cobb to purchase the marijuana in Colombia. After the initial airplane venture had failed, both Hobson and Waldrop made telephone calls to Cobb pressuring him to attempt a second airplane venture. Cobb agreed, after securing a promise that Hobson and Waldrop would purchase a substantial portion if not all of the load. These facts establish to our satisfaction that Hobson and Waldrop could properly be found to have associated themselves with the venture and to have sought by their actions to make the venture succeed. *Trevino*, 556 F.2d at 1269-70.

The appellants' reliance upon *United States v. Jackson* for a contrary conclusion is misplaced. 526 F.2d 1236 (5th Cir.1976). There, the evidence indicated that Jackson assisted his co-defendant in the distribution of cocaine already in the possession of the co-defendant. Jackson's conviction for aiding and abetting his co-defendant in the possession with intent to distribute cocaine was reversed on appeal, on the ground that while evidence was sufficient to support his conviction for aiding and abetting the distribution of cocaine, there was no evidence that he aided and abetted the possession. The court's conclusion was based upon an absence of evidence that Jackson had helped his co-defendant obtain the cocaine; rather, it was clear that Jackson did not aid or abet his colleague until after the cocaine had come into the co-defendant's possession. In contrast, Hobson and Waldrop's efforts

were directed toward assisting Cobb in acquiring the marijuana. The court's opinion in *Jackson* is thus wholly consistent with our conclusion that Hobson and Waldrop were properly convicted of possession under an aiding and abetting theory.

III. Bascaro

[50] The only issue raised by Bascaro that merits previously as a common issue, is his double jeopardy claim.[16] The government appears to acknowledge that Bascaro was previously tried and convicted of conspiracy to possess marijuana with intent to distribute in connection with a smuggling venture undertaken by the enterprise/conspiracy being prosecuted in the instant case. If true, this state of affairs would raise a question as to the validity of Bascaro's subsequent continuing criminal enterprise conviction and possibly his RICO conspiracy conviction in this case. *See United States v. Phillips*, 664 F.2d 971, 1015 n. 64 (5th Cir. Unit B 1981); *see generally id.* at 1004-1015. We do not, however, reach the merits of Bascaro's double jeopardy claim. The issue is raised for the first time on appeal; Bascaro's double jeopardy defense was thus waived by his failure to assert it at trial. *Grogan v. United States*, 394 F.2d 287, 289 (5th Cir.1967).

[51] Bascaro attempts to justify his failure to raise the double jeopardy defense until now on the

[16]As previously discussed in connection with Villanueva's continuing criminal enterprise conviction (CCE), conspiracy to import is a lesser included offense of CCE; in light of Bascaro's CCE conviction, we must therefore vacate his other conspiracy conviction on double jeopardy grounds.

basis of the district court's denial of Bascaro's motion for a bill of particulars. This is an exercise in obfuscation. In order to make a timely objection to the instant prosecution on the double jeopardy grounds previously discussed, Bascaro needed only the indictment and record of judgment in the former prosecution, and the indictment in the present case. A bill of particulars would have furnished no additional relevant information.

[52] Bascaro's motion for a bill of particulars, and his assignment of error to the court's refusal to grant that motion, relates to a different and less troubling double jeopardy claim. The function of a bill of particulars is to provide a defendant with information about the details of the charge against him if this is necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial. *United States v. Diecidue*, 603 F.2d 535 (5th Cir.1979); *see also* C. Wright, *Federal Practice and Procedure* § 129. A bill of particulars has been held to be appropriate where necessary to permit the defendant to plead double jeopardy in the event of a subsequent prosecution of the same offense. *United States v. Gorel*, 622 F.2d 100, 104 (5th Cir.1979). The thrust of Bascaro's argument is that his activities in connection with the smuggling episode for which he had been previously convicted were not listed among the overt acts of the enterprise in the instant indictment, yet were used to convict him again here. He asserts that a bill of particulars would have revealed as much, but that as a consequence of the denial of his motion for a bill of particulars, Bascaro was unprepared to lodge a double jeopardy objection.

The motion for a bill of particulars was properly denied. Acts committed by Bascaro in connection with

the episode for which he was previously tried were not included among the overt acts listed in the present indictment for the very simple reason that those acts were not part of the present indictment. The fact that various witnesses made passing references to the episode in the course of their testimony does not prove the contrary. In short, Bascaro was not convicted in this case on the basis of facts peculiar to the incident for which he had been previously tried, and a bill of particulars amplifying the details of the charges against him in this case would have served no purpose.

Conclusion

James raises no issues singular to him that warrant separate discussion. He and other defendants raise a number of questions concerning a variety of alleged prosecutorial misconduct that a review of the record reveals wholly without merit. The convictions of Hobson, Waldrop, Fernandez, and James are affirmed. Villanueva's convictions for conspiracy to import a controlled substance and conspiracy to possess a controlled substance with intent to distribute are vacated, as is Bascaro's conviction for conspiracy to import. Their remaining convictions are affirmed.

AFFIRMED IN PART, VACATED IN PART.

APPENDIX C

[FILED DEC. 6 1984]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5547

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ANTONIO E. BASCARO, PATRICK M. WALDROP, RUSSELL HOBSON, III, MANUEL ERIC VILLANUEVA, GUSTAVO J. FERNANDEZ, MANUEL W. JAMES,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Florida

ON PETITIONS FOR REHEARING
(DEC 6 1984)

Before HENDERSON and CLARK, Circuit Judges, and ATKINS*, District Judge.

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*Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:

Thomas A. Clarke
United States Circuit Judge

APPENDIX D

[FILED DEC 13 1984]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5547

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ANTONIO E. BASCARO, PATRICK M. WALDROP, RUSSELL HOBSON, III, MANUEL ERIC VILLANUEVA, GUSTAVO J. FERNANDEZ, MANUEL W. JAMES,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Florida

ORDER:

( ) The motion of Appellant, Waldrop, for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of Appellant, Waldrop, for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including January 20, 1985,

the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____
for a further stay on the issuance of the mandate is GRANTED to and including _____, under the same condition as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

Thomas A. Clark
UNITED STATES CIRCUIT JUDGE

MDT-4
(Rev. 6/82)

APPENDIX E

Waldrop's Requested Intruction #1

The Enterprise
[To follow statutory definition of a RICO Enterprise]

Counts One and Two of this Indictment define the "enterprise" as one established by Manuel Eric Villaneuva, Jose Luis Acosta and Antonio E. Bascaro for the purpose of importing into the United States from a place outside thereof, and possessing with intent to distribute and distributing within the United States multi-ton quantities of marijuana on a continuing basis, by the use of various entities including, but not limited to, Air Taos, Inc., Morgan Air Transport, Inc., d/b/a Panhandle Airways, Cottondale Farms, Inc., Carib Airways, Inc., Caribbean Marketing Systems, Inc., and Aucilla Game and Fish Reserve, Inc. a/k/a Perry Game and Fish Reserve, Inc.

Waldrop's Requested Instruction #3

Count One—Patrick M. Waldrop

In order to find defendant, Patrick M. Waldrop, guilty of Count One, you must find that the government has proven, beyond a reasonable doubt, that a conspiracy to participate in the affairs of the enterprise established by Manuel Eric Villanueva, Jose Luis Acosta and Antonio Bascaro, did in fact exist, and that Patrick M. Waldrop agreed to participate therein by agreeing to commit at least two acts of racketeering, which furthered the affairs of this particular conspiracy. In considering whether Patrick M. Waldrop has manifested his agreement to

enter into this conspiracy, you must find, beyond a reasonable doubt, that at least two of the following acts were a) a part of this particular conspiracy *and* b) that Mr. Waldrop agreed to commit them:

1) The alleged importation of approximately 26,000 pounds of marijuana aboard Constellation L749A Aircraft N6021C, on or about February 14, 1979, as charged in Count Four;

2) The alleged possession with intent to distribute approximately 80,000 pounds of marijuana, on or about April 26, 1978, as charged in Count Ten;

3) The alleged possession with intent to distribute approximately 26,000 pounds of marijuana aboard Constellation L749A Aircraft N6021C, on or about February 14, 1979, as charged in Count Ten.

You have been instructed on the required elements which must be proven beyond a reasonable doubt before you may find the defendant guilty of any of these three offenses. As I have already stated, any particular one of these offenses must be proved beyond a reasonable doubt also before you may use it as one of the two acts of racketeering necessary to satisfy this element of Count One.

If you find that Patrick M. Waldrop is a member of another conspiracy, not the one charged in the Indictment, then you must acquit him. In other words, to find Patrick M. Waldrop guilty of this Count, you must find that he was a member of the conspiracy charged in the Indictment and not some other, separate conspiracy.

Waldrop's Requested Instruction #4

Count Two—Patrick M. Waldrop

In order to find defendant, Patrick M. Waldrop, guilty of Count Two, you must find that the government has proven, beyond a reasonable doubt that, the enterprise established by Manuel Eric Villanueva, Jose Luis Acosta and Antonio E. Bascaro, as previously described, existed in fact, and that Mr. Waldrop knowingly and willfully participated in the conduct of this particular enterprise's affairs through a pattern of racketeering activity.

In order to conclude that Mr. Waldrop participated through a "pattern of racketeering activity," you must find that he committed at least two of the following acts and that they were in furtherance of the conduct of this particular conspiracy:

1) The alleged importation of approximately 26,000 pounds of marijuana aboard Constellation L749A Aircraft N6021C, on or about February 14, 1979, as charged in Count Four;

2) The alleged possession with intent to distribute approximately 80,000 pounds of marijuana, on or about April 26, 1978, as charged in Count Nine;

3) The alleged possession with intent to distribute approximately 26,000 pounds of marijuana aboard Constellation L749A Aircraft N6021C, on or about February 14, 1979, as charged in Count Ten.

You have been instructed on the required elements which must be proven beyond a reasonable doubt before

you may find the defendant guilty of any of these three offenses. As I have already stated, any particular one of these offenses must be proved beyond a reasonable doubt also before you may use it as one of the two acts of racketeering necessary to satisfy this element of Count Two.

Furthermore, in order to find Patrick M. Waldrop guilty of Count Two, you must find beyond a reasonable doubt that the two or more acts of racketeering were acts in furtherance of the particular enterprise charged by this Indictment, and that they are sufficiently connected with the other by some common scheme, plan or motive so as to constitute a pattern.

Waldrop's Requested Instruction #9

Mr. Waldrop's Theory of Defense—Count One

Mr. Waldrop's theory of the defense is that he must be acquitted of the charges contained in Count One of this Indictment, because the government has not proven, beyond a reasonable doubt, the following:

1) That he manifested any agreement to participate, directly or indirectly, in any enterprise established by Manuel Eric Villanueva, Jose Luis Acosta, and Antonio E. Bascaro through a pattern of racketeering activity;

2) That the evidence fails to establish that he agreed to participate in two acts of racketeering which were connected, directly or indirectly, to the enterprise established by Manuel Eric Villanueva, Jose Luis Acosta, and Antonio E. Bascaro.

Furthermore, Mr. Waldrop alleges that, *even if* you find beyond a reasonable doubt that he agreed to commit the alleged acts charged in Counts Four and Ten relating to the Constellation, the testimony of the government witness, Bill Cobb, if believed, demonstrates that this particular venture was a venture he conducted on his own, and was without any participation by this enterprise; to wit, the enterprise established by Manuel Eric Villanueva, Jose Luis Acosta and Antonio E. Bascaro. Thus, that venture is not a part of the affairs of the enterprise alleged in Count One.

Waldrop's Requested Instruction #10

Mr. Waldrop's Theory of Defense—Count Two

Mr. Waldrop's theory of the defense is that he must be acquitted of the charges contained in Count Two of this Indictment, because the government has not proven, beyond a reasonable doubt, the following:

1) That he knowingly or willfully participated, directly or indirectly, in any enterprise established by Manuel Eric Villanueva, Jose Luis Acosta, and Antonio E. Bascaro through a pattern of racketeering activity;

2) That the evidence fails to establish that he committed two acts of racketeering which were connected, directly or indirectly, to the enterprise established by Manuel Eric Villanueva, Jose Luis Acosta, and Antonio E. Bascaro.

Furthermore, Mr. Waldrop alleges that, *even if* you find beyond a reasonable doubt that he committed the alleged acts charged in Counts Four and Ten relating to the Constellation, the testimony of the government witness, Bill Cobb, if believed, demonstrates that this particular venture was a venture he conducted on his own, and was without any participation by this enterprise; to wit, the enterprise established by Manuel Eric Villanueva, Jose Luis Acosta and Antonio E. Bascaro. Thus, that venture is not a part of the affairs of the enterprise alleged in Count Two.

APPENDIX F

The Indictment.

Second, that the defendant traveled with the specific intent to distribute the proceeds of an unlawful activity as later defined.

And third, that the defendant afterwards knowingly and willfully either personally or by aiding and abetting another, distributed or attempted to distribute the proceeds.

The term interstate commerce means transportation or movement between one state and another.

While the government must prove the defendant traveled in interstate commerce with the specific intent to distribute proceeds of the unlawful activity, it need not prove that was the only reason or purpose for the travel. The term unlawful activity includes importation, possession, and possession with intent to distribute of marijuana.

Count 2—that's not Count 11, it's roman numeral II—Count 2 of the indictment alleges that from on or about January 1977 and continuously afterwards up to and including September 3, 1981, defendants Manuel Eric Villaneuva, Antonio E. Bascaro, Manuel W. James, Gustavo J. Fernandez, Patrick C. Waldrop, and Russell Hobson were persons associated with an enterprise or an enterprise as defined by Title 18, United States Code, Section 1961(4), that the enterprise engaged in or its activities affected interstate commerce and the

defendants knowingly and willfully participated in the enterprise's affairs through a pattern of racketeering endeavor in violation of Title 18, United States Code, Section 1962(C).

This statute makes it unlawful for any person employed by or associated with any enterprise engaged in or the activities of which affect interstate or foreign commerce, to conduct or participate directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity.

Count 2 alleges that the enterprise consisted of a group of individuals associated in fact for the purpose of importing multi-ton quantities of marijuana into the United States from a place outside of the United States, possessing multi-ton quantities of marijuana with the intent to distribute and distributing within the United States, multi-ton quantities of marijuana, a scheduled one controlled substance.

Now, let me define some of the terms of this statute for you.

The term enterprise, as used in the statute, includes any individual, partnership, corporation, association, or other legal entity and any group of individuals associated in fact, although not a legal entity.

The term racketeering activity, as defined by the statute, includes the offenses described in Counts 4, 6, 7, 8, 9, 10, 15, 20, 21, 22 and 23. It also includes the offenses described in Overt Acts 29, 30, 31 and 32.

You may not find any defendant guilty under Count 2 except on the basis of acts of racketeering charged specifically against him and which you have found unanimously beyond a reasonable doubt that he committed.

You are again reminded that the indictment is but an accusation, that it is not evidence of any of the matter it charges.

A finding of a pattern of racketeering activity, as defined by the statute, requires proof beyond a reasonable doubt of at least two acts of racketeering activity within ten years of each other, one of which must have occurred after October 15, 1970.

To be sufficient to constitute the second element of the offense, it is not necessary that the two acts found be acts of the same kind or nature, so long as you find beyond a reasonable doubt that the two acts of racketeering activity occurred within the time specified and that each was connected with the other by some common scheme, plan or motive so as to constitute a pattern.

The terms conduct and participate in the continuance of an enterprise include the performance of acts, function or duties which are necessary to assist in the operation of the enterprise.

A person may be found to conduct or participate in the conduct of an enterprise even though he is a mere servant or employee having no part in the management or control of the enterprise and no share in the profits.

Finally, let me explain interstate and foreign commerce. The government is required to show beyond a reasonable doubt that the enterprise was engaged in or affected interstate or foreign commerce.

Interstate commerce is commerce between several states.

Foreign commerce is commerce between the United States and foreign nations.

The government is not required to show any particular degree of effect on interstate commerce or foreign commerce. If you find beyond a reasonable doubt that there was an enterprise which imported marijuana into the United States from a place outside of the United States or possessed with the intent to distribute or distributed within the United States large amounts of marijuana, then the required effect has been established.

If you do not so find, then the required effect has not been established. You must find the defendants not guilty under count 2.

In order to establish that any of the defendants named in count 2 of the indictment committed the offense charged in that count, the government must prove as to that particular defendant each of the following elements beyond a reasonable doubt.

First, that the defendant was associated with an enterprise as I have defined for you.

Second, that the Defendant engaged in a pattern or racketeering activity as I have defined it for you by knowingly and willfully committing, or knowingly and willfully aiding and abetting at least two acts of racketeering activity as hereinafter explained.

That at least two acts of racketeering activity occurred within ten years of each other, that one of such offenses took place after October the 10th, 1970, that the offenses were connected with each other by some common scheme, plan or motive so as to constitute a pattern, and not merely a series of disconnected acts.

Fourth, that the commission of two or more connected offenses the defendants conducted or participated in the conduct of the enterprise.

Fifth, that the enterprise engaged in or that its activities affected interstate or foreign commerce.

Now, ladies and gentlemen, I am going to go through the defendants charged in Count 2 and list for you those alleged acts of racteteering charged, specifically to each defendant, which may form the basis for satisfying the second element of Count 2, if found unanimously by you to have been committed beyond a reasonable doubt.

First, the defendant Manuel Eric Villanueva. To prove the second element of the five, all of which must be proven beyond a reasonable doubt before you may find Villanueva guilty of the charges of Count 2, the government must prove beyond a reasonable doubt Villanueva committed any two of the following alleged offenses.

One, importation into the United States of possession with the intent to distribute of approximately 40 thousand pounds of marijuana aboard the vessel Sea Star as alleged in Overt Act 32.

Two, aiding and abetting possession of marijuana aboard The Tanila with the intent to distribute as alleged in Count 6.

Three, aiding and abetting possession of marijuana aboard The Navigator as alleged in Count 7.

Four, aiding and abetting the possession in Madison County of marijuana with the intent to distribute as alleged in Count 8.

Five, aiding and abetting possession in Tallahassee of marijuana with intent to distribute as alleged in Count 9.

Six, traveling in interstate commerce with the intent to distribute the proceeds of the unlawful importation possession, and distribution of marijuana as alleged in Count 15.

Seven, aiding and abetting the importation of marijuana aboard The Miss Susan and Carol B., as alleged in Count 20.

Eight, aiding and abetting possession with intent to distribute of marijuana aboard The Miss Susan and Carol B., as alleged in Count 21.

Nine, aiding and abetting the importation of marijuana aboard The Miss Sunbury as alleged in Count 22.

Or, ten, aiding and abetting possession with intent to distribute of marijuana The Miss Sunbury as alleged in Count 23.

As I have already stated, any particular one of these offenses must be proved beyond a reasonable doubt before you may use it as one of the two acts of racketeering needed to satisfy the second element of Count 2.

The defendant Antonio Bascaro, to prove the second element of five, all of which must be proven beyond a reasonable doubt before you may find Bascaro guilty of the charges in Count 2, the government must prove beyond a reasonable doubt that Bascaro committed any two of the following alleged offenses.

First, importation into the United States and possession with the intent to distribute of approximately 40 thousand pounds of marijuana aboard the vessel Sea Star, as alleged in Overt Act 32.

Second, aiding and abetting possession of marijuana aboard The Tanila with the intent to distribute, as alleged in Count six.

Third, aiding and abetting possession of marijuana aboard The Navigator, as alleged in Count 7.

Fourth, aiding and abetting possession of marijuana in Madison County of marijuana with intent to distribute, as alleged in Count 8.

Five, aiding and abetting possession in Tallahassee of marijuana with intent to distribute as alleged in Count 9.

Six, traveling in interstate commerce with the intent to distribute the proceeds of the unlawful importation, possession and distribution of marijuana as alleged in Count 15.

Seven, traveling in interstate commerce in violation of Title 18, United States Code, Section 1952(A)(3), to promote, manage, establish, act, carry on or facilitate the promotion, management, establishment or carrying on of marijuana importation, possession of marijuana with intent to distribute, or marijuana distribution by traveling from Fort Lauderdale, Florida, to Savannah, Georgia to inspect a proposed off-load site as alleged in Overt Act 29.

Eight, traveling in interstate commerce in violation of Title 18, United States Code, Section 1952(A)(3), to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of marijuana importation, possession of marijuana with intent to distribute, or marijuana distribution by traveling from Fort Lauderdale, Florida to Chattanooga, Tennessee, to inspect marijuana storage and distribution facilities in Flat Rock, Alabama, as alleged in Overt Act 30.

Or, nine, traveling in interstate commerce in violation of Title 18, United States Code, to promote, manage, establish, carry on, or facilitate the promotion, management, or establishment or carrying on of marijuana importation, possession of marijuana with intent to distribute, or marijuana distribution by traveling from Fort Lauderdale, Florida to Savannah, Georgia, to supervise the importation and off-loading of marijuana destined for Flat Rock, Alabama, as alleged in Overt Act 31.

As I have already stated, any particular one of these offenses must be proved beyond a reasonable doubt before you may use it as one of the two acts of racketeering needed to satisfy the second element of Count 2.

Defendant Manuel W. James. To prove the second element of the five, all of which must be proven beyond a reasonable doubt before you may find James guilty of the charges in Count 2, the government must prove beyond a reasonable doubt that James committed any two of the following alleged offenses.

First, importation into the United States and possession with the intent to distribute of approximately 40 thousand pounds of marijuana aboard the vessel Sea Star, as alleged in Overt Act 32.

Second, aiding and abetting the importation of marijuana aboard the Constellation, as alleged in Count 4.

Three, aiding and abetting possession of marijuana aboard The Tanila with the intent to distribute, as alleged in Count 6.

Four, aiding and abetting possession of marijuana aboard The Navigator, as alleged in Count 7.

Five, aiding and abetting possession in Tallahassee of marijuana with intent to distribute, as alleged in Count 9.

Or, six, aiding and abetting possession with intent to distribute of marijuana aboard the Constellation, as alleged in Count 10.

Again, any particular one of these offenses must be proved beyond a reasonable doubt before you may use it as one of the two acts of racketeering necessary to satisfy the second element of Count 2.

Gustavo J. Fernandez. To prove the second element of the five, all of which must be proven beyond a reasonable doubt before you can find Fernandez guilty of the charges in Count 2, the government must prove beyond a reasonable doubt that Fernandez committed any two of the following alleged offenses.

First, aiding and abetting possession of marijuana aboard The Tanila with the intent to distribute, as alleged in Count 6.

Second, aiding and abetting possession of marijuana aboard The Navigator, as alleged in Count 7.

Three, aiding and abetting possession in Madison County of marijuana with the intent to distribute, as alleged in Count 8.

Four, aiding and abetting importation of marijuana aboard The Miss Susan and Carol B., as alleged in Count 20.

Fifth, abiding and abetting possession of marijuana aboard The Miss Susan and Carol B., as alleged in Count 21.

Six, aiding and abetting importation of marijuana aboard The Miss Sunbury, as alleged in Count 22.

Or, Seven, aiding and abetting possession with intent to distribute of marijuana aboard The Miss Sunbury, as alleged in Count 23.

As I have already stated, any particular one of these offenses must be proved beyond a reasonable doubt before you may use it as one of the two acts of racketeering needed to satisfy the second element of Count 2.

The defendant, Patrick C. Waldrop. To prove the second element of the five, all of which must be proven beyond a reasonable doubt before you may find Waldrop guilty of the charges in Count 2, the government must prove beyond a reasonable doubt that Waldrop committed any two of the following alleged offenses.

First, aiding and abetting importation of marijuana aboard The Constellation, as alleged in Count 4.

Second, aiding and abetting possession of marijuana aboard the Constellation with intent to distribute as alleged in count—excuse me.

The first offense that you may consider is aiding and abetting importation of marijuana aboard the Constellation, as alleged in Count 4.

Second, aiding and abetting possession of marijuana in Tallahassee, Florida, with intent to distribute, as alleged in Count 9.

Or, three, aiding and abetting possession of marijuana aboard the Constellation with intent to distribute, as alleged in Count 10.

Again, any particular one of these offenses must be proved beyond a reasonable doubt before you may use it as one of the two acts of racketeering needed to satisfy the second element of Count 2.

The defendant Russell Hobson. To prove the second element of the five, all of which must be proven beyond a reasonable doubt before you may find Hobson guilty of the charges in Count 2, the government must prove beyond a reasonable doubt that Hobson committed any two of the following alleged offenses.

One, aiding and abetting importation of marijuana aboard the Constellation, as alleged in Count 4.

Two, aiding and abetting possession of marijuana aboard the Constellation with intent to distribute. As alleged in Count 10.

Again, any particular one of these offenses must be proved beyond a reasonable doubt before you may use it as one of the two acts of racketeering needed to satisfy the second element of Count 2.

Counts, 7, 8 and 9 described in the list of offenses you may consider for Bascaro in determining if the second element of Count 2 has been proven or alleged in Overt Acts 29, 30, and 31. These overt acts each allege interstate travel in aid of racteteering, a violation of establish, or carry on unlawful activity, it need not

be proved that such purpose was the only reason or motive to travel.

Unlawful activity includes importation, distribution, and possession with intent to distribute marijuana.

Count 1, Rico Conspiracy. As I indicated to you earlier, it is different from Count 2.

Count 1 of the indictment charges that from on or about January '77 up to and including September 3, 1981, in the northern district of Florida, the defendants —and all of them are named—willfully and knowingly conspired, combined, confederated and agreed together with each other and with persons known and unknown to violate Title 18, United States Code, Section 1962(C), by agreeing to conduct and to participate directly or indirectly in the conduct of the affairs of the enterprise through a pattern of racketeering activity.

Count 1 alleges that the enterprise consisted of a group of individuals associated in fact for the purpose of importing into the United States of America from a place outside the United States of America and possessing with intent to distribute and distributing within the United States multi-ton quantities of marijuana on a continuing basis.

As I have just described under Count 2, Title 18, United States Code, Section 1962(C), makes it unlawful for any person through a pattern of racketeering activity to knowingly and willfully participate in the conduct of the affairs of an enterprise engaged in or the activities of which affect interstate commerce.

These terms are defined and the essential elements of the offense forbidden by Section 1962 are more fully explained in the part of these instructions dealing with Count 2 of the indictment that I have already instructed you on.

The defendants named in Count 1 of the indictment, however, are not charged in that count with violating Section 1962(C). Rather, as previously stated, they are charged with knowingly and willfully conspiring to commit that offense in violation of Title 18, United States Code, Section 1962(D), which provides that it shall be unlawful for any person to conspire to violate any of the provisions of subsection (C) of this section.

There are three elements which must be proved beyond a reasonable doubt in order to establish the offense prescribed by this law.

First, that a conspiracy—as I have already defined for you—to conduct or participate directly or indirectly in the conduct of the affairs of an enterprise engaged in or affecting foreign or interstate commerce through a pattern of racketeering activity consisting of the commision of two or more acts of racketeering activity was willfully performed—excuse me—was willfully formed by two or more persons and was existing at the time alleged in the indictment.

Second, that the defendant with knowledge of the conspiracy willfully became a member of the conspiracy agreeing to participate directly or indirectly in the conduct of the affairs of the enterprise.

And, third, that at least one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at or about the time and place alleged in furtherance of some object of the conspiracy as charged.

Let me direct your attention to the second element above. The special kind of conspiracy charged in Count 1 requires that, to satisfy the second element that the defendant willfully became a member of such conspiracy, the government must also prove beyond a reasonable doubt that the defendant agreed by his words or actions to participate in the affairs of the alleged enterprise by committing two or more racketeering activities as defined earlier on page 30.

This does not mean, however, that the government must prove that the defendant actually committed those two racketeering activities. Rather, the government need only prove beyond a reasonable doubt that the defendant agreed to commit two racketeering activities in furtherance of the alleged enterprise.

Here then is one major difference between Count 2, which we have already discussed, and the alleged conspiracy under Count 1.

A defendant had to commit two acts of racketeering activity before he could be found guilty under Count 2.

In contrast, under the special conspiracy charged in Count 1, the government must prove beyond a reasonable doubt that the defendant agreed to commit two such racketeering acts.

In considering racketeering acts which a defendant may have agreed to commit in furtherance of the alleged enterprise, you are limited to those acts alleged in the indictment—

(SHORT PAUSE.)

THE COURT: In considering racketeering acts which a defendant may have agreed to commit in furtherance of the alleged enterprise, you are limited to those acts alleged in the indictment against the defendant as outlined on pages 34 to 44 inclusive.

With respect to the first and fourth elements defined above, that the defendant was associated with an enterprise and that through commission of two or more connected offenses he conducted or participated in the conduct of the enterprises affairs, you are instructed that proof of several separate enterprises, should there been such, is not proof of the single overall enterprise charged in the indictment, unless one of the several enterprises which is proved is the single enterprise which the indictment charges.

What you must do is determine whether the single enterprise consisting of a group of individuals associated in fact existed as charged in the indictment. If you find that no such enterprise existed, then you must acquit the defendants as to Count 2.

However, if you are satisfied that such an enterprise existed, you must determine who conducted or participated in the conduct of its affairs as charged. If you find that a particular defendant was associated

with another enterprise not the one charged in the indictment, then you must acquit that defendant.

In other words, to find a defendant guilty, you must find that he was associated with the enterprise charged in the indictment and not some other separate enterprise.

Count 24 charges Fernandez and Bascaro with

* * *